Supreme Court, U.S.
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No. 99 237

IN THE
SUPREME COURT OF THE UNITED STATES

CHIROPRACTIC AMERICA,
Petitioner,

v.

JAYNEE LAVECCHIA, in her official capacity as Commissioner of Department of Banking and Insurance (DOB&I), and DONALD BRYAN, in his official capacity as Assistant Commissioner for Legislative and Regulatory Affairs of DOB&I, CHRISTIE WHITMAN, in her official capacity as Governor of the State of New Jersey.
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Richard A. Jaffe
5 Greenway Plaza,
Suite 1710
Houston, TX 77046
PH: (713) 626-3550
FX: (713) 626-9420
ATTORNEY FOR
PETITIONER

75 pp

QUESTIONS PRESENTED

1. This Petition for Certiorari examines the abstention doctrine. Is it appropriate to uphold and sanction abstention by selecting requisite elements from different forms of abstention, even though the case does not satisfy all the requisite elements of any one type of abstention?

2. Should this Court hold that *Burford* abstention is only appropriate where there is a threat of turning a federal court into a parallel federal judicial review institution of specific regulatory decisions concerning individual claims, as articulated by Justice Breyer in *Bath Memorial Hospital v. Maine Health Care Finance Commission*, 853 F.2d 1007 (1st. Cir. 1988), which analysis was endorsed by Circuit Judge Stapleton in dissent, and implicitly by four other judges of the Third Circuit who voted for *en banc* rehearing?

PARTIES TO THE PROCEEDING

Petitioners

CHIROPRACTIC AMERICA

Respondents

JAYNEE LAVECCHIA, in her official capacity as Commissioner of Department of Banking and Insurance ("DOB&I"), and DONALD BRYAN, in his official capacity as Assistant Commissioner for Legislative and Regulatory Affairs of DOB&I, CHRISTIE WHITMAN in her official capacity as Governor of the State of New Jersey.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit was issued on April 14, 1999. A copy of the Opinion is included in the Appendix at Appendix A at 1a-29a. The Opinion of the District Court for the District of New Jersey dated February 8, 1999, is unpublished and is included in Appendix B at 30a-49a. The District Court ordered entry of the final judgment on June 14, 1999, a copy of which is attached as Appendix C at 50a-51a. The *En Banc* Rehearing was denied (in a 7 to 5 vote) on May 11, 1999, a copy of which is produced as Appendix D at 52a-53a.

JURISDICTION

The United States Court of Appeals for the Third Circuit issued its Opinion on April 14, 1999. Petitioners timely filed a Petition for Rehearing and Suggestion for Rehearing *En Banc* which the Third Circuit denied on May 11, 1999 (Appendix D, pp 52a-53a). This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution XIV Amendment
Due Process and Equal Protection

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner filed this lawsuit to challenge the constitutionality of regulations promulgated by the New Jersey State Department of Banking and Insurance ("DOBI"), which regulations dramatically impair health care practitioners' ability to treat automobile accident victims. The most significant and unusual fact in this case is that the New Jersey State Board of Chiropractic Examiners (the state agency which is given the statutory mandate to protect the public and enforce the chiropractic standard of care) has determined that the regulations violate the chiropractic standard of care in the State of New Jersey, and will cause harm to accident victims.

The State moved to dismiss under a variety of grounds, including four abstention theories. The district court dismissed the case on *Burford* abstention grounds. Essentially, the court held that there was an adequate state remedy, and that the case involved insurance which is a matter of great importance. Although not specifically relying on *Colorado River*, the district court was clearly influenced

by the fact that there were several pending state appeals also challenging the regulations, all of which were filed after the commencement of this federal action.

On appeal, a majority of the Third Circuit panel affirmed the district court's result, but it did so by writing an opinion which basically eviscerated abstention jurisprudence by selectively choosing factors from different abstention doctrines to justify its result. The effect of the majority's opinion is that federal courts (at least in the Third Circuit) no longer have to conclude that every element of a discrete abstention doctrine is required to justify abstention.

On Rehearing en banc, only five of the twelve active judges voted to grant rehearing. Hence rehearing *en banc* was denied.

ARGUMENT IN SUPPORT OF CERTIORARI

Certiorari should be granted in this case because the Circuit Majority's opinion basically overturns most of the existing abstention precedent, and it will obligate, or at least allow district courts to dismiss cases under abstention which should be heard. These are strong contentions, but they are supported by the dissenting opinion filed by Judge Stapleton.

In essence, the problem and indeed the danger in the Circuit Majority's decision is that it blurs the abstention doctrines (as Judge Stapleton states in his dissent, and as was implicitly accepted by four other Circuit Court Judges). The Circuit Majority justifies abstention in this case in part because of a parallel state court litigation, but it does not consider the *Colorado River* factors which make abstention inappropriate. The Circuit Majority defers to the state court

which may render a decision making the resolution of the federal questions unnecessary, but does not consider the *Pullman* abstention factors which preclude the application of *Pullman* abstention in this case.

Based on this decision, the district courts will now be free to pick and choose between the different forms of abstention, but will not have to make the findings which are the prerequisites to invoking the discrete abstention doctrine. It is not an overstatement to say that the Circuit Majority's opinion overturns all abstention authority, because it promotes abstention and dismissal regardless of whether the requisite elements of the discrete abstention doctrines have been satisfied.

Furthermore, the Circuit Majority has created a two-tier system of federal claims, and held that civil rights claims are not sufficiently worthy of protection to justify having a federal court potentially declare a state law or regulation unconstitutional. This holding is inconsistent with Supreme Court authority and case law in all circuits. For these reasons, this Court should hear and decide this case.

ARGUMENT

The Circuit Majority's Opinion Creates New Rules For Abstention Which Are Inconsistent With All Authority

A. The Circuit Majority's Opinion

The Circuit Majority articulates two new principles of law:

1. *Burford* abstention is all but mandated where adjudication of state law claims may avoid a federal constitutional claim. (Appendix A at 7a)

2. Only certain kinds of federal claims like preemption and exclusive jurisdiction merit resolution by a federal court, if there is an abstention issue because of parallel state and federal actions. Indeed, the Circuit Majority goes so far as saying that the existence of a constitutional claim "does not affect our analysis" of whether abstention is appropriate. (Appendix A at 14a).

Armed with these new rules of jurisprudence, the Circuit Majority finds that a federal review will disrupt the state's attempt to implement a coherent state policy for two reasons: First, a federal review will have to go into many details about the state statute and regulations, which review is better left to the state courts. Second, the federal claims are in reality the same claims as those presented in state court. Hence there is no real need for federal intervention.

None of these reasons or new principals are right or consistent with established precedent.

B. The Circuit Majority has Engrafted *Pullman* Abstention into *Burford* Without Taking the Principal *Pullman* Limiting Factor

Pullman abstention is suggested where a federal court is presented with a constitutional question concerning the validity of a state law, and the state courts would likely interpret the challenged state law so as to eliminate, or at least significantly alter the constitutional questions. *Ohio Bureau of Employment Services v. Hodory,* 431 U.S. 471, 97 S.Ct 1898, 52 L.Ed.2d 513 (1977).

The Circuit Majority transforms the *Pullman* avoidance of a federal constitutional question into a basis for its *Burford* abstention result. However, it does not consider the *Pullman* elements which preclude *Pullman* abstention. Specifically, the Circuit Majority does not find or even discuss whether the regulations are unclear or unsettled, and how the state court ruling will obviate the need to decide the federal constitutional issue. Indeed, in all circuits, such a finding could only be made if the ambiguous or unsettled state law is "obviously susceptible" to a construction that would obviate the need to decide the federal constitutional issue. *Chez Sez III Corp. v. Township of Union*, 945 F.2d at 632 (3rd Cir. 1991) *citing Hawaii Hous. Auth. v. Midkiff,* 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984).[1] Needless

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[1] In *Ohio Bureau of Employment Services v. Hodory, supra*, 431 U.S. at 481, 97 S.Ct at 1905, 1898, 52 L.Ed.2d 513 (1977), it was held that an argument that a state agency might

to say, there was no such finding by the Circuit Majority in this case.

The Circuit Majority's opinion is therefore inconsistent with Supreme Court authority and all circuit authority in that it disregards the specific requirements for abstention based on unsettled issues of state law. It attempts to circumvent these requirements by calling its abstention result, *Burford.* A rose is a rose, and *Pullman* by any other name is still abstention based on unresolved state law issues. By a stroke of nomenclature, the Circuit Majority has erased fifty years of *Pullman* jurisprudence, and has invited the district courts to do the same.

C. The Circuit Majority Uses the *Colorado River* Parallel Litigation Abstention Justification Without Considering the *Colorado River* Factor Which Weighs Heavily Against Abstention

The Circuit Majority holds that in light of the pending state court proceedings, there is no need for federal intervention. By relying on the existence of a parallel state litigation as grounds to abstain, the Circuit Majority is in reality invoking the court's discretion under the *Colorado River* abstention doctrine. *(Colorado River Water Conservation District v. U.S.,* 424 U.S. 80 (1976)).

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overturn offending action held too speculative to support *Pullman* abstention because "There is a point however at which the possible benefits of abstention become too speculative to justify or require avoidance of the question."

However, the Circuit Majority fails to consider the *Colorado River* factors which all but preclude abstention in this case.[2]

Specifically, according to this Court: "The presence of federal law issues must always be a major consideration weighing against surrender" [of jurisdiction by the federal court]. *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. at 25-26 (1983). But the Circuit Majority overturns this holding by (i) finding that the Petitioners' assertion of a constitutional claim "does not affect our analysis" (opinion at page 14a), and (ii) by creating a two-tier classification of federal claims: those deserving of protection from abstention (like preemption and supremacy claims) and the others, like mere constitutional claims which do not survive because of abstention.

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[2] In attempting to articulate a test for applying this new type of abstention, this Court in *Colorado River* listed several factors relevant to the determination:

1. Whether the state court assumed in rem jurisdiction over property;
2. The inconvenience of the federal forum;
3. The desirability of avoiding piecemeal litigation; and
4. The order in which jurisdiction was obtained by the concurrent forums.

The Court clarified and limited *Colorado River* abstention in *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 103 S. Ct. 927, 74 L.Ed.2d 765 (1983).

The Circuit Majority's approach is also inconsistent with most jurisdictions which hold that the presence of a 1983 claim makes abstention in favor of a parallel state litigation improper. See e.g. *Tovar v. Billmeyer*, 609 F.2d 1291, 1293 (9th Cir. 1979):

> "The focus under *Colorado River Water Conservation District* is upon whether exceptional circumstances exist that indicate that concurrent jurisdiction by state and federal courts is likely to cause piecemeal litigation, waste of judicial resources, inconvenience to the parties, and conflicting results. Where these consequences are a likely result of concurrent jurisdiction, it is proper to consider dismissal of the federal proceeding. Dismissal, however, is proper only when, in the judgment of the court, these consequences outweigh in a given situation the 'unflagging obligation' of the federal courts to exercise the jurisdiction given to them . . . . This obligation is particularly weighty when those seeking a hearing in federal court are asserting, as the appellants are here, their right to relief under 42 U.S.C. § 1983. Under such circumstances conflicting results, piecemeal litigation, and some duplication of judicial effort is the unavoidable price of preserving access to the federal relief which section 1983 assures."

The Circuit Majority also incorrectly finds that the state and federal litigations are parallel. The basis of the Majority's finding is that the two litigations are governed by

the same arbitrary and capricious standard. However the Circuit Majority conflates the standard of review with the nature of the claim. Just because two claims use the same standard of review does not mean that the claims are identical. Federal constitutional claims of due process (substantive and procedural) and equal protection are clearly not identical to state common law limitations to the appellate review of state regulations.

Since the claims are not identical, abstention is not possible because abstention in favor of a parallel state litigation is only appropriate if the claims are identical. *Ryan v. Johnson*, 115 F.3d 193 (3rd Cir. 1997); *General Glass Industries v. Menswear Medical Foundation*, 973 F.2d 197 (3rd Cir. 1992).

In short, the Circuit Majority's discussion of the parallel state and federal litigation suffers from the same deep conceptual and methodical flaw as its *Pullman* non-analysis. It uses the fact of parallel litigation to justify what it calls *Burford* abstention, without engaging in the analysis of the *Colorado River* factors, thereby freeing it and all district courts to dismiss a case just because there is a state case which in any way resembles the federal case. With respect, that is not the law anywhere in this Country, and is inconsistent with essentially all relevant authority dealing with abstention in favor of parallel state litigation.

D. The Majority's View of What Constitutes Disruption of State Matters is Wrong and Inconsistent With Supreme Court Authority

The Circuit Majority concludes that "federal review of a party's claims would interfere with New Jersey's efforts to establish and maintain a coherent regulatory policy." (Opinion at page 11a) thereby satisfying the third requisite element under *Burford* as articulated by Justice Scalia in *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350, 361 (1989). The Circuit Majority's view of what constitutes disruption is not consistent with Supreme Court authority.

According to the Circuit Majority, disruption will occur because (i) the federal court would have to consider the purpose of the statute underlying the challenged regulations, whether the regulations conformed with legislative intent, etc. which are better left to a state court (opinion at page 12a), and (ii) federal review would frustrate the need for uniformity. Neither justification is sufficient to abstain.

First, there is no inherent reason why a federal district court is less able to review state legislative history or the purpose of legislation than a state appellate court, if such analysis is truly necessary to the disposition of a federal claim. The Circuit Majority cites no authority for this proposition of law.

Second, no one has contested the laudatory aim or purpose of the statute or regulations in question. Everyone agrees with the idea of reducing auto insurance costs and indeed, even in reducing the medical costs relating to auto

accidents. The question in this case is whether the means chosen in the regulations are rationally related to those laudable ends. Therefore, contrary to the Circuit Majority's opinion, there is no need for an extensive analysis of the legislative history or purpose of the statute.

Third, the fact that a federal lawsuit may void all or even a part of a state law or regulation which has coherency and uniformity as its goal is irrelevant if the state action is unconstitutional because as this Court has held and the circuits acknowledge: "there is, of course, no doctrine requiring abstention merely because resolution of a federal question may result in any overturning of a state policy." *Zablocki v. Redhail*, 434 U.S. 374, 380, N.5, 54 L ED.2d 618, 98 S. Ct. 673 (1978). Neither New Jersey, nor any other state, "has the right to an unconstitutional policy, coherent or otherwise." *Allstate Ins. Co. v. Sabbagh*, 603 F.2d 228, 232. (1st Cir. 1979).

Accordingly, the Circuit Majority was incorrect when it decided that the third part of Justice Scalia's test in the *New Orleans Public Service* case had been satisfied.

E. The Majority's Decision is Inconsistent with Cases in Other Circuits

The Majority's opinion is inconsistent in result and analysis with cases from other circuits dealing with *Burford* abstention in the insurance area. *See. e.g. Bath Memorial Hospital v. Maine Health Care Finance Commission*, 853 F.2d 1007 (1st. Cir. 1988) and *Alliance of American Insurers v. Cuomo, et al*, 854 F.2d 591 (2nd Cir. 1988). Both cases presents strikingly similar fact patterns to the instant case.

In *Alliance of American Insurers*, a group of insurers challenged the constitutionality of a New York Medical and Dental Malpractice insurance statute which greatly increased insurance companies' financial exposure. The statute was part of an attempt to solve a serious malpractice insurance problem threatening New York.

New York made every argument made by the Defendants in this case and accepted by the district court and the Circuit Majority in this case.

The New York district court accepted New York's arguments and abstained. The Second Circuit reversed, holding that none of the stated reasons alone or taken together justify abstention and specifically stated that:

> "There is no ambiguous state law issue. Specific channels of judicial review under state law are irrelevant to consideration of the federal question. There is no attempt to avoid any prior state court or agency determination."

Alliance of American Insurers v. Cuomo, et al, 854 F.2d at 601 (2nd Cir. 1988). The Majority's result is inconsistent with the Second Circuit decision.

The Circuit Majority's opinion is also inconsistent in result and analysis with the First Circuit decision in *Bath Memorial Hospital v. Maine Health Care Finance Commission*, 853 F.2d 1007 (1st. Cir. 1988), (per then Judge Breyer) (which decision is discussed extensively in the Dissent's opinion (Appendix A at pages 23a-24a). The Circuit Majority's opinion has misapplied the *Bath* case and misstates Justice Breyer's trenchant analysis that *Burford*

abstention requires a threat of turning a federal court into a parallel federal judicial review institution of specific regulatory decisions concerning individual claims. Contrary to the Circuit Majority's opinion, this case does not involve claims of individuals involving specific decisions like the ones challenged in *Burford* or its progeny. Therefore, abstention is inappropriate.

Petitioner would respectfully suggest that Justice Breyer's "threat of a parallel federal institution" analysis be incorporated into the Court's *Burford* jurisprudence.

CONCLUSION

This Court should hear and decide this case. If it does not, district courts (at least in the Third Circuit) will be free to dismiss cases under abstention by picking and choosing elements from the various abstention doctrines. Remember, we are not arguing whether there have been possible legal errors in a jury verdict, or whether summary judgment was properly granted. Rather, the doctrine involved in this case involves whether a litigant who has a right to file a federal action, and has filed a valid federal claim can obtain a federal adjudication of that claim.

Mindful of abstention's drastic effect, up until now, the courts, and especially this Court has uniformly acknowledged that abstention is a limited exception to the "virtually unflagging duty" to decide cases. That the courts take seriously this duty is manifest in judicial authority which has carefully crafted narrow exceptions based on specific fact patterns which require the presence of elements or specific factors to support an abstention finding. But no more, if the Majority's decision stands.

Respectfully submitted,

Richard A. Jaffe, Esq.
5 Greenway Plaza,
Suite 1710
Houston, Texas 77046
Telephone: (713) 626-3550
Fax: (713)-626-9420
ATTORNEY FOR
APPELLANTS

APPENDIX A

Filed April 14, 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-5060

CHIROPRACTIC AMERICA,

Appellant

v.

JAYNEE LAVECCHIA, in her official capacity as Commissioner of Department of Banking and Insurance ("DOB&I"), and DONALD BRYAN, in his official capacity as Assistant Commissioner for Legislative and Regulatory Affairs of DOB&I, CHRISTIE WHITMAN in her official capacity as Governor of the State of New Jersey.

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 98-cv-4986)
District Judge: Hon. Jerome B. Simandle

Argued: March 2, 1999

Before: STAPLETON, RENDELL and ALDISERT,
Circuit Judges

(Filed April 14, 1999)

Richard A. Jaffe (argued)
5 Greenway Plaza, Suite 1710
Houston, TX 77046

ATTORNEY FOR APPELLANTS

Joseph L. Yanotti (argued)
John C. Grady
Office of the Attorney General
of New Jersey
R.J. Hughes Justice Complex
CN 117
Trenton, NJ 08625

ATTORNEYS FOR APPELLEES

OPINION OF THE COURT

ALDISERT, *Circuit Judge.*

Several New Jersey individual chiropractors and professional organizations that represent chiropractors appeal from the district court's dismissal of their complaint on the basis of abstention under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). They contend that the district court should have adjudicated their federal constitutional challenge to certain regulations of New Jersey's comprehensive no-fault automobile insurance law. The regulations were promulgated by Appellee Jaynee LaVecchia, Commissioner of the Department of Banking and Insurance. We will affirm.

I.

On May 19, 1998, in an attempt to reduce escalating automobile insurance costs in the state, the Legislature of the State of New Jersey enacted the Automobile Insurance Cost Reduction Act (the "Act"). The Act substantially restructured New Jersey's method of providing no-fault insurance benefits to automobile accident victims. This was an amendment of the state's 1972 no-fault insurance law, which previously had been amended in 1983, 1988 and 1990. The new Act was the result of the Legislature's determination

> that the substantial increase in the cost of medical expense benefits indicate[d] that the benefits [were] being over utilized for the purpose of gaining standing

> to sue for pain and suffering, . . . necessitating the imposition of further controls on the use of those benefits, including the establishment of a basis for determining whether treatments or diagnostic tests are medically necessary.

N.J. Stat. Ann. § 39:6A-1.1. Thus, the Act states in relevant part:

> Benefits provided under basic coverage shall be in accordance with a benefit plan provided in the policy and approved by the commissioner. The policy form, which shall be subject to the approval of the commissioner, shall set forth the benefits provided under the policy, including eligible medical treatments, diagnostic tests and services as well as such other benefits as the policy may provide. The commissioner shall set forth by regulation a statement of the basic benefits which shall be included in the policy. Medical treatments, diagnostic tests, and services provided by the policy shall be rendered in accordance with commonly accepted protocols and professional standards and practices which are commonly accepted as being beneficial for the treatment of the covered injury. . . . Protocols shall be deemed to establish guidelines as to standard appropriate treatment and diagnostic tests for injuries sustained in automobile accidents, but the establishment of standard treatment protocols or protocols for the administration of diagnostic tests shall not be interpreted in a [sic] such a manner as to preclude variance from the standard when warranted by reason of medical necessity.

N.J. Stat. Ann. § 39:6A-3.1(4)(a). "Medical necessity" exists when treatment of the particular injury "(1) is not primarily for the convenience of the injured person or provider, (2) is the most appropriate standard or level or service which is in accordance with standards of good practice and standard professional treatment protocols . . . and (3) does not involve unnecessary diagnostic testing." N.J. Stat. Ann. § 39:6A-2m.

The precise constitutional attack lodged by these Appellants concentrates on six so-called "care paths" in the

comprehensive regulations developed by the Commissioner with the assistance of PricewaterhouseCoopers. These care paths are a set of protocols and standard treatments and practices for specific diagnosed back injuries. Each care path designates the appropriate treatment for particular back injuries that can be reimbursed absent a showing of medical necessity. *See* N.J. Admin. Code § 11:3-4. The regulations also include an arbitration mechanism for resolution of disputes concerning the medical necessity of treatment that deviates from or exceeds that which has been delineated in the care paths.

On September 8, 1998, the Commissioner published the proposed regulations, *see* 30 N.J. Reg. 3211, and received comments from the public through November 4, 1998. On November 4, 1998, the Commissioner held a public hearing to receive testimony concerning the proposed regulations. Representatives of health care providers, including chiropractic associations, attorneys and insurers, submitted written comments to the proposed regulations and presented testimony at the public hearing. Appellants stated that the care paths were "ill-conceived, detrimental to patient care, and dangerous."

After making minor modifications to the proposed regulations, the Commissioner signed the regulations for adoption on November 30, 1998. These modified regulations were scheduled to become operative on March 22, 1999. *See* 30 N.J. Reg. 4401(a).

Appellants filed their initial complaint in the district court on November 4, 1998, before the Commissioner adopted the regulations. After the regulations were adopted, three appeals challenging the regulations were filed in the New Jersey Superior Court, Appellate Division, one by physicians and other health care professionals and two by trial lawyers associations. Thereafter, in their first amended complaint filed in the District Court on January 12, 1999, Appellants alleged that the regulations violated their Fourteenth Amendment substantive due process, procedural due process and equal protection rights. Before us, Appellants explain:

> The final regulations contain only two changes concerning chiropractic care that are relevant to this

> lawsuit. First, chiropractors can now treat auto accident victims with no serious injuries, (i.e. sprains and strains under care paths one, three and five for up to twelve visits during the first months....)
>
> The final regulations state that chiropractors can treat patients with radiculopathy or herniated discs, (i.e. patients who fall under care paths two, four and six) as long as they have no positive or objective findings for either conditions.

Appellants' Brief at 5.

The First Amended Complaint alleged that the care paths eliminate the availability of reimbursable chiropractic care for victims of automobile accidents and severely restrict the number of reimbursable chiropractic care visits allowed in the first month following an automobile accident. Appellants based their substantive due process and equal protection claims on assertions that the care path provisions were arbitrary and capricious and were not rationally related to the legitimate aim of the enabling legislation. *See* App. at 50-51. As to their procedural due process count, Appellants contended that the regulations' arbitration provisions "den[ied] health care practitioners any practical right to contest the medical treatment judgments of the [personal injury protection benefits] carriers." App. at 52. Appellants sought declaratory and injunctive relief.

On the very next day, January 13, 1999, Appellants filed an appeal in the New Jersey Superior Court that sets forth issues similar to those contained in the appeals of the health care professionals. Both of these appeals are now pending before the New Jersey Superior Court, and challenge the regulations as being beyond the scope of the Department of Banking and Industry, and as establishing rigid care paths and treatment mandates contrary to accepted standards of medical care. They contend that the regulations unreasonably substitute the agency's dictates for professional medical judgment of the injured person's physician by specifying the precise care to be provided. They contend also that the agency has acted in a manner inconsistent with the enabling legislation. *See* S.A. at 128,

139. All three groups of Appellants—health care professionals and physicians, attorneys and chiropractors—contend in these appeals that the regulations were adopted without appropriate consultation with national and state standard-setting for professional organizations. *See* S.A. at 128, 130, 139.

The district court abstained from ruling on Appellants' federal constitutional claims on the basis of *Burford*, and dismissed Appellants' First Amended Complaint. We have jurisdiction to consider the present appeal pursuant to 28 U.S.C. § 1291. Regarding a district court's abstention decision, our review of the underlying legal questions is plenary, but we review the decision to abstain for abuse of discretion. *See Trent v. Dial Medical of Fla., Inc.*, 33 F.3d 217, 223 (3d Cir. 1994).

II.

At least since 1941, in *Railroad Comm'n of Texas v. Pullman*, 312 U.S. 496 (1941), the federal courts have recognized circumstances under which they will decline to adjudicate cases even though they have jurisdiction under the Constitution and statutes. These circumstances are loosely gathered under discrete concepts of abstention named after leading Supreme Court cases. The Court has said: "The various types of abstention are not rigid pigeonholes into which federal courts must try to fit cases. Rather, they reflect a complex of consideration designed to soften the tensions inherent in a system that contemplates parallel judicial processes." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11 n.9 (1987).

Abstention from the exercise of jurisdiction, however, is the exception rather than the rule. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813 (1976). Nevertheless, abstention is firmly rooted.

Several reasons are assigned for withholding the exercise of jurisdiction. Abstention is recognized to avoid deciding a federal constitutional question when the case may be disposed on questions of state law, *Pullman*; to avoid needless conflict with the administration by a state of its own affairs, *Burford*; to leave to the states the resolution of

unsettled questions of state law, *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959); to avoid duplicative litigation, *Colorado River*. In addition, the doctrine of "Our Federalism" teaches that federal courts must refrain from hearing constitutional challenges to state action under certain circumstances in which federal action is regarded as an improper intrusion on the right of a state to enforce its own laws in its own courts, *Younger v. Harris*, 401 U.S. 37 (1971).

At the risk of over-simplification, we can say that these reasons come within the rubric of comity, or the idea "that certain matters are of state concern to the point where federal courts should hesitate to intrude; and they may also concern judicial 'economy,' the notion that courts should avoid making duplicate efforts or unnecessarily deciding difficult questions." *Bath Memorial Hosp. v. Maine Health Care Fin. Comm'n*, 853 F.2d 1007, 1012 (1st Cir. 1988).

We will affirm the district court's judgment on the basis of *Burford* abstention. We conclude that the Act and the regulations promulgated by the Commissioner represent a complex legislative and regulatory package designed to reform automobile insurance law in New Jersey, and that the courts of New Jersey are in the best position to consider the validity of the applicable regulations under state law, and can do so without having to examine the constitutional questions that have been raised by Appellants. "It is particularly desirable to decline to exercise equity jurisdiction when the result is to permit a state court to have an opportunity to determine questions of state law which may prevent the necessity of decision on a constitutional question." *Burford*, 319 U.S. at 333 n.29 (citing *Chicago v. Fieldcrest Dairies, Inc.*, 316 U.S. 168, 173 (1942)).[1] Thus, *Burford* clearly allows a federal court, in fact urges a federal court, to decline to exercise jurisdiction when adjudication of questions of state law (which can only be done by state courts) may avert the need to delve into constitutional issues like those presented here. This case

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1. The quoted language of *Burford* and *Fieldcrest Dairies* bears a strong resemblance to the Court's language in *Pullman*, thereby exhibiting how the various doctrines are not "rigid pigeonholes."

fits comfortably into the scheme envisioned by the *Burford* Court.

In *Burford*, the Supreme Court stated that a federal court should refuse to exercise its jurisdiction in a manner that would interfere with a state's efforts to regulate an area of law in which state interests predominate and in which adequate and timely state review of the regulatory scheme is available. *See* 319 U.S. at 332-334. The purpose of *Burford* abstention has been articulated by this court: " 'to avoid federal intrusion into matters of local concern and which are within the special competence of local courts.' " *Kentucky West Virginia Gas Co. v. Pennsylvania Public Util. Comm'n*, 791 F.2d 1111, 1115 (3d Cir. 1986) (quoting *International Bhd. of Elec. Workers v. Public Serv. Comm'n*, 614 F.2d 206, 212 n.1 (9th Cir. 1980)); *see also Meredith v. Talbot Cty., Md.*, 828 F.2d 228, 231 (4th Cir. 1987) ("The underlying purpose of *Burford* abstention is to enable federal courts to avoid needless conflict with the administration by a state of its own affairs."); 17A Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 4243.

Recently the Supreme Court provided a clear definition of the *Burford* doctrine:

> Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans, 491 U.S. 350, 361 (1989) (quoting *Colorado River*, 424 U.S. at 814). It is from this definition that we determine that the district court acted properly when it dismissed Appellants' First Amended Complaint.

A.

We begin with an analysis of whether timely and adequate state-court review is available, for "[o]nly if [the court] determines that such review is available, should it turn to the other issues." *Riley v. Simmons*, 45 F.3d 764, 771 (3d Cir. 1995).

Timely and adequate state-court review has been and continues to be available to Appellants. New Jersey law provides that a party may take an appeal as of right to the Superior Court of New Jersey, Appellate Division, for review of a final action of any state administrative agency or officer and for review of the validity of any rule promulgated by any state agency or officer. *See* N.J. Court Rule 2:2-3(a)(2). Appellants and three other groups of litigants have filed such an appeal of the regulations promulgated by the Commissioner pursuant to the Act.

Appellants contend that the state-court proceeding could not provide timely and adequate review because the Appellate Division would have been unable to resolve the appeal prior to the regulations' March 22, 1999 effective date. Appellants also contend that the Appellate Division would not provide them with adequate relief because that court could not hold an evidentiary hearing. Both arguments fail.

First, the Appellate Division has the authority to accelerate the usual briefing and oral argument schedule, and is empowered to stay agency action pending appeal. *See* N.J. Court Rule 2:9-7. Further, if the Appellate Division declines its authority to stay the agency action, a party may submit an application for a stay with the Supreme Court of New Jersey "when necessary to prevent irreparable injury." N.J. Court Rule 2:2-2. Therefore, the Appellate Division had the ability to expedite the proceedings in order to rule on the validity of the regulations at issue here prior to March 22, 1999, or at least stay their enforcement until a ruling is issued.

Second, Appellants incorrectly assert that the Appellate Division is without power to hold an evidentiary hearing. New Jersey court rules permit supplementation of the record on appeal, including the presentation of live

witnesses before a specially designated judge of the New Jersey Superior Court. *See* N.J. Court Rule 2:5-5(b). Further, testimony presented by Appellants during the public hearing on November 4, 1998, as well as documents filed during the public comment period, became part of the record to be considered by the Appellate Division.

Appellants have not demonstrated the absence of timely and adequate state-court review in this matter. We therefore turn to the question of whether a federal court's adjudication of Appellants' claims would interfere with New Jersey's efforts to implement a policy concerning no-fault insurance law.

B.

The district court held, and we agree, that the second prong of the *Burford* doctrine, as laid out in *New Orleans Public Service, supra*, is applicable here. This prong of *Burford* requires us to examine three issues: (1) whether the particular regulatory scheme involves a matter of substantial public concern, (2) whether it is "the sort of complex, technical regulatory scheme to which the *Burford* abstention doctrine usually is applied," *Felmeister v. Office of Attorney Ethics*, 856 F.2d 529, 534 (3d Cir. 1988), and (3) whether federal review of a party's claims would interfere with the state's efforts to establish and maintain a coherent regulatory policy. *See New Orleans Public Serv.*, 491 U.S. at 361. All three issues can be answered in the affirmative.

There can be no doubt that a state's efforts to curtail the skyrocketing costs of automobile insurance premiums within its borders present a matter of substantial public concern. New Jersey's dubious notoriety for "out-of-control" automobile insurance premiums has been well-documented and has reflected negatively on the state. *See, e.g.*, Thomas Ginsburg, *NJ Auto Insurance Up 8% in '96*, The Philadelphia Inquirer, Feb. 12, 1998, at A1; Robert Schwaneberg, *Insurers, Legislators Blame Car Premium Mess on Each Other*, The Star-Ledger, Feb. 5, 1998, at 31; John Kolesar, *Stuck in the Middle of the Road: The Legislature's Failure to Adopt True No-Fault Insurance has Permitted Jerseyans to*

be Run Over by High Rates, The Star-Ledger, Nov. 23, 1997, at 1; Sharon Tennyson, *The Impact of Rate Regulation on State Automobile Insurance Markets*, 15 J. Ins. Reg. 502 (July 1, 1997). Since 1972, the New Jersey legislature has attempted to refine its no-fault insurance law in order to create a scheme that will serve New Jersey drivers and their passengers, insurers, health care service providers and those who represent them. The Act and the regulations promulgated by the Commissioner clearly pertain to a matter in which the state has a substantial and important interest.

Additionally, a review of the Act and the regulations establishes that we are presented with a complex regulatory scheme for purposes of *Burford* abstention. The Legislature and the Commissioner have promulgated all-encompassing, highly technical, extremely intertwined and interrelated provisions that describe the extent of reimbursable medical treatment, applicable deductibles and co-pays and accepted medical protocols. The regulations include detailed flow charts of the accepted care paths. There is a delineated dispute mechanism in place for accident victims who seek reimbursement for treatments that deviate from the care paths. There can be no doubt that the Act and regulations at issue here constitute a complex regulatory solution to the state's no-fault insurance problem.

Thus, we are left to examine whether federal review of Appellants' constitutional claims would interfere with New Jersey's efforts to establish and maintain a coherent regulatory policy. We believe that " 'the regulatory system [has] as a central purpose uniformity to achieve important local interests that would be frustrated by federal court review.' " *University of Md. v. Peat Marwick Main & Co.*, 923 F.2d 265, 272 (3d Cir. 1991) (quoting Erwin Chemerinsky, *Federal Jurisdiction* 112 (Supp. 1990)). The cases relied upon by Appellants present distinguishable factual scenarios from the one presented here, and lend further support for our holding.

The Act and regulations are aimed at reducing the high cost of automobile insurance in New Jersey. The State of New Jersey sought to achieve this goal by revising reimbursement standards for first-party, no-fault personal

injury protection medical expense benefits. The regulations address reimbursement for nearly all medical providers who treat automobile accident victims.

Thus, a court conducting a review of Appellants' due process and equal protection claims would have to examine the purpose of the Act, and determine whether the regulations conformed with the New Jersey Legislature's intent and whether the regulations singled out chiropractors and their patients for unfair treatment. Clearly, the regulations would be subject to rational basis/arbitrary and capricious examination in either sovereign's court. *See Bowman Transportation, Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285-286 (1974) (agency action that does not implicate fundamental rights or suspect classes is subject to arbitrary and capricious review in which court examines whether there is rational basis for agency's action); *Brady v. Department of Personnel*, 693 A.2d 466, 472 (N.J. 1997) (review of state regulatory policy subject to arbitrary and capricious standard); *Beattystown Community Council v. Department of Environmental Protection*, 712 A.2d 1170, 1176 (N.J. Super. Ct. App. Div. 1998) (same). Because Appellants, and three other groups of plaintiffs, have presented an "arbitrary and capricious" argument to the Superior Court of New Jersey, Appellate Division, review by this court, or any federal court, at this time would interfere significantly with New Jersey's efforts to establish and maintain a coherent automobile insurance regulatory policy. *See Alabama Pub. Serv. Comm'n v. Southern Railway*, 341 U.S. 341, 349 (1951) ("As adequate state court review of an administrative order based upon predominantly local factors is available . . . intervention of a federal court is not necessary for the protection of federal rights.") (footnote omitted). Although Appellants have not raised Fourteenth Amendment claims before the Appellate Division, that court would have to conduct the same form of "arbitrary and capricious" review to resolve Appellants' state court allegations. The Appellate Division's scope of review under New Jersey Rule 2:2-3(a)(2) involves an examination of: "(1) whether the agency's action violates the express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on

which the agency bases its action; and (3) whether, in applying legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors." *Matter of Musick*, 143 N.J. 206, 216 (1996). Appellants' federal suit is thus entangled in a "skein of state law." *New Orleans Pub. Serv., Inc.*, 491 U.S. at 361.

The district court recognized the problem:

> As in *Marx [v. Snedecker*, 612 F. Supp. 1148 (D.N.J. 1985)], analysis of the constitutional questions raised in this case would involve an in-depth analysis of the legislative purposes of AICRA, a major reform effort in an area of law—automobile insurance—that has typically been left to the states to regulate. *See Lac D'Amiante du Quebec v. American Home Assurance Co.*, 864 F.2d 1033, 1038-39 (3d Cir. 1988) ("the states have assumed the primary role in regulating insurance"). This case requires an analysis of whether the challenged regulations, as they apply to chiropractors and their patients, are consistent with the Legislature's attempt in enacting AICRA to reform New Jersey's comprehensive no-fault automobile insurance law so as to reduce the high cost of automobile insurance in New Jersey, or whether chiropractors and their patients have been unfairly singled out for unfavorable treatment. The outcome of this inquiry turns upon an assessment of the rationality of the basis for the regulations, which involves an examination of the administrative procedure and the substantive result of the state regulatory scheme. Unlike in cases where the state regulations under constitutional review were enacted to comply with a federal mandate in the particular regulatory field, *see, e.g., New Jersey Hospital Assoc. v. Waldman*, 73 F.3d 509 (3d Cir. 1995) (involving a due process challenge to a state agency's reduction in Medicaid reimbursement rates mandated by the Boran Amendments to the Medicaid Act, 42 U.S.C. § 1396(a)(13)(A)), there is no federal interest in the regulation of automobile insurance, an area in which Congress has deferred to the states. *See Lac*

> *D'Amiante*, 864 F.2d at 1038-39 (discussing the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15, which provides for exclusive state regulation of the business of insurance).

Dist. Ct. Op. at 20-21, *reprinted in* App. at 23-24.

III.

That the Appellants have raised federal constitutional challenges to the regulations does not affect our analysis. We do not consider the teachings of *Bath Mem. Hosp. v. Maine Health and Fin. Comm'n*, 853 F.2d 1007 (1st Cir. 1988), to compel a different result. In that case there was facial attack on the constitutionality of a statute that regulated hospital charges. Such an attack is not present here. Speaking for the court, then-Judge Breyer explained that the Bath plaintiffs:

> do not seek individualized fact- (or cost-) specific regulatory decision making. To the contrary, they attack the statute as it is written. Permitting a federal court to decide this kind of constitutional claim would not interfere with the workings of a lawful state system, as such intervention threatened in *Burford*, *Alabama P.S.C.*, or [*Allstate Insurance Co. v.] Sabbagh*[, 603 F.2d 228 (1st Cir. 1979)]. Review here would not threaten to create in the federal court a parallel regulatory review institution. The risks of interference here seem no greater than those present whenever a federal court decides whether a state regulatory statute is constitutional.

853 F. 2d at 1014-1015.

In contrast with the circumstances in *Bath*, the Appellants here *do* indeed seek individualized fact-specific regulatory decision making. They do not attack the statute as written; they attack only discrete portions of regulations promulgated by the Commissioner, not the legislature, and review here would certainly create in the federal court a parallel regulatory review institution. The very factors that were not present in *Bath* to militate against applying *Burford* are unmistakably present in the case at bar. They plainly call for the application of abstention here.

Our focus should not be on *whether* a federal claim has been presented, but rather on the *nature* of that claim. Courts have held almost uniformly, for example, that abstention is inappropriate when a federal plaintiff asserts a preemption/Supremacy Clause claim. *See, e.g., New Orleans Pub. Serv., Inc.*, 491 U.S. at 362-363; *Kentucky West Va. Gas Co. v. Pennsylvania Pub. Util. Comm'n*, 791 F.2d at 1115-1116; *Middle S. Energy, Inc. v. Arkansas Pub. Serv. Comm'n*, 772 F.2d 404, 417 (8th Cir. 1985); *Baggett v. Department of Professional Regulation, Bd. of Pilot Commissioners*, 717 F.2d 521, 524 (11th Cir. 1983); *International Bhd. of Elec. Workers*, 614 F.2d at 212 n.1. This is because "supremacy clause claims are 'essentially one[s] of federal policy,' so that 'the federal courts are particularly appropriate bodies for the application of preemption principles.'" *Kentucky West Va. Gas Co.*, 791 F.2d at 1115 (quoting *Kennecott Corp. v. Smith*, 637 F.2d 181, 185 (3d Cir. 1980)). Additionally, we have held that abstention is inappropriate in cases in which federal courts have exclusive jurisdiction over at least a portion of the claims presented. *See Riley*, 45 F.3d at 773-774 (federal court had exclusive jurisdiction over plaintiffs' rule 10b-5 securities claims).

The reasoning that supports the exercise of federal question jurisdiction in preemption and exclusive jurisdiction cases is not present here. In this case, Appellants assert that the Commissioner and the Department of Banking and Insurance have overstepped their lawful authority in dealing with a substantial and complex local concern. Appellants' due process attack on the care path regulations requires the same analysis as their state law contentions that the regulations are arbitrary and capricious.[2] Federal court review of Appellants' substantive due process argument would thereby create a parallel federal regulatory review institution.

A reviewing federal court would be required to delve

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2. Appellants limited their New Jersey court contentions to state law under an appropriate reservation. *See England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964).

beyond the text of the regulations in order to adjudicate Appellants' constitutional claims. It would be required to examine the Commissioner's motivations, the Legislature's intent, the overarching goal of a reformed no-fault insurance law and the processes promulgated regarding dispute resolution. These are complex matters of state concern that are currently the subject of the appeals before the Appellate Division. The regulations can, and should, be reviewed by the state court on state law grounds, obviating the need to address constitutional questions. *See Burford*, 319 U.S. at 333 n.29.

Abstention under *Burford* is appropriate in this case. The district court properly applied the law and did not exceed the permissible bounds of discretion when it decided to abstain.

The judgment of the district court will be affirmed.

STAPLETON, *Circuit Judge*, dissenting:

The Court today endorses the proposition that "*Burford* . . . allows a federal court, in fact urges a federal court, to decline to exercise jurisdiction when adjudication of questions of state law (which can only be done by state courts) may avert the need to delve into constitutional issues like those presented here." Slip Op. at 7. Specifically, the Court holds that because plaintiffs "have presented an 'arbitrary and capricious' argument to the [state court], review by this court . . . would interfere significantly with New Jersey's efforts to establish and maintain a coherent automobile insurance regulatory policy." Slip Op. at 12.

I do not understand how adjudication of appellants' due process and equal protection claims will in any way impair New Jersey's ability to maintain a coherent policy. More fundamentally, however, the propositions the Court today affirms cannot coexist with the well established propositions that (1) "exhaustion [of state remedies] is not a prerequisite to an action under § 1983," *Patsy v. Board of Regents*, 457 U.S. 496, 501 (1982), (2) "the opportunity to avoid decision of a constitutional question does not alone justify abstention by a federal court," *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 815 n.21 (1976), (3) "the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction," *Colorado River*, 424 U.S. at 817 (quoting *McClelland v. Carland*, 217 U.S. 268, 282 (1910)), (4) "there is . . . no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of state policy," *NOPSI v. Council of City of New Orleans*, 491 U.S. 350, 363 (1989) (quoting *Zablocki v. Redhail*, 434 U.S. 374, 380 n.5 (1978)), and (5) "*Burford* represents an 'extraordinary and narrow exception to the duty of [a federal court] to adjudicate a controversy properly before it.'" *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 728 (1996). Accordingly, I respectfully dissent.

I.

The plaintiffs in this case are chiropractors and professional organizations that represent chiropractors both

in New Jersey and nationally. They challenge the constitutionality of certain regulations recently promulgated by the New Jersey Department of Banking and Insurance ("DOBI"), pursuant to authority granted in the state's Automobile Insurance Cost Reduction Act ("AICRA"). The New Jersey legislature enacted AICRA in 1998 in an effort to stem the rising cost of private passenger automobile insurance in the state. To further this objective, AICRA calls for DOBI to promulgate standard professional treatment protocols for the diagnosis and treatment of common automobile injuries.

Pursuant to authority granted in AICRA, DOBI has developed regulations which identify six "care paths" associated with back injuries. For each care path, the regulations specify the diagnostic procedures and treatments for which reimbursement will be required from an insurer, without a special showing of medical necessity. Reimbursement for other diagnostic procedures and treatment is required only if they are shown to be medically necessary. The regulations also provide a process for resolving disputes about the medical necessity of care that deviates from or exceeds the degree of care designated in the care paths, culminating in arbitration.

During the period for public comment, the plaintiffs and other health care professionals objected that the "care paths" were "ill-conceived, detrimental to patient care, and dangerous." With few changes to the proposed regulations relevant to the chiropractors' concerns, the final regulations were adopted on November 30, 1998, to become operative on March 22, 1999.

Plaintiffs first filed suit in federal court challenging the constitutionality of the regulations. In their First Amended Complaint, they allege that the regulations violate the plaintiffs' substantive due process, procedural due process, and equal protection rights. In support of their substantive due process claim, plaintiffs assert that "[t]he care paths and arbitration provisions are unreasonable, arbitrary and capricious and do not bear a rational relationship to the legitimate aim of the enabling legislation." App. at 50. In support of their equal protection claim, plaintiffs insist that "there is no rational basis for prohibiting chiropractors from

providing reimbursable care to patients under care paths 2, 4, and 6." App. at 51. Finally, in support of their procedural due process claim, the complaint alleges that "the arbitration provisions contained in the . . . regulations . . . deny health care practitioners any practical right to contest the medical treatment judgments of the PIP carriers." App. at 52. Based on these allegations, plaintiffs requested the District Court to declare the regulations dealing with chiropractic care unconstitutional and to enjoin their implementation insofar as they relate to chiropractic care. The plaintiffs' federal complaint is thus limited to claims that the final product of the rule making process (i.e., the regulations) is in conflict with the United States Constitution.[1]

Shortly after instituting their federal suit, plaintiffs sought judicial review of the regulations under state law from New Jersey Superior Court's Appellate Division. They argued that the DOBI, in promulgating the regulations, exceeded the scope of its authority under AICRA. They also

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1. In support of their substantive due process claim, plaintiffs, after asserting that the care paths and arbitration provisions are arbitrary and capricious, allege that "the regulations appear to be targeted at restricting chiropractic care to accident victims, and they manifest a bias and bad faith towards chiropractors and accident victims who opt to undergo chiropractic care." App. at 50. I read this as further explication of the plaintiffs' facial attack on the regulations. The briefing before us suggests, however, that plaintiffs may wish to argue that the regulations are invalid because the rule makers were motivated by bias towards chiropractors. While it would not change my view as to the propriety of abstention if I believed the District Court would have to delve into the subjective intent of the rule makers, I know of no authority for the proposition that a substantive due process claim permits a federal court, in a case not involving infringement of a fundamental right, to inquire into the motive behind state legislative or regulatory rule making. Where no fundamental right is implicated, a state law comports with substantive due process and must be upheld if it is rationally related to a legitimate governmental interest. *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 491 (1955); *Alexander v. Whitman*, 114 F.3d 1392, 1403 (3d Cir. 1997). *Midnight Sessions, Ltd. v. City of Philadelphia*, 945 F.2d 667 (3d Cir. 1991), relied upon by the plaintiffs, dealt with a challenge to a refusal to issue a dance hall license, not with a challenge to rule making.

attacked the process by which the regulations were developed, arguing, *inter alia*, that they "were adopted without appropriate consultation with national and state standard setting organizations or the applicable state professional licensing boards." App. at 86. Consistent with *England v. Louisiana State Bd. of Med. Exam'rs*, 375 U.S. 411 (1964), plaintiffs expressly "reserve[d] their right to pursue federal claims in a previously filed federal court action." App. at 86.

The District Court abstained on the basis of *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). Plaintiffs ask that we reverse the dismissal of their federal suit and remand this matter to the District Court for further proceedings, including consideration of their application for a preliminary injunction. The DOBI asks that we affirm based on *Burford*, or, alternatively, on the *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941), *Younger v. Harris*, 401 U.S. 37 (1971), or *Colorado River*, 424 U.S. 800, abstention doctrines. I would grant the relief that plaintiffs seek.

II.

Because the District Court dismissed plaintiffs' complaint, we must take their allegations to be true. *See Monaghan v. Deakins*, 798 F.2d 632 (3d Cir.1986), *aff'd in part and vacated in part*, 484 U.S. 193 (1988). In reviewing a District Court's decision to abstain, the underlying legal questions are subject to plenary review, although the decision to abstain is reviewed for abuse of discretion. "The determination of whether this case falls in the area within which the district court may exercise discretion is therefore a matter of law, reviewable on a plenary basis. Only if we determine that the case falls within this range will we apply an abuse of discretion standard in reviewing the district court's decision to abstain." *University of Md. v. Peat Marwick Main & Co.*, 923 F.2d 265, 270 (3d Cir. 1991).

III.

I begin with the Supreme Court's admonition that abstention is the "exception and not the rule" and that a

federal court's obligation to adjudicate claims within its jurisdiction is "virtually unflagging." *University of Md.*, 923 F.2d at 271, (quoting *NOPSI*, 491 U.S. at 359). As the Supreme Court recently reiterated, federal courts

> have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution. [T]he courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction. When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction. . . . The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied.

NOPSI, 491 U.S. at 358-59 (quotations and citations omitted).

A District Court may abstain in a case in which it has jurisdiction only if that case falls within one of the four, very narrow, exceptions articulated in *Burford*, *Pullman*, *Younger*, and *Colorado River*. To preserve the general rule, courts have delineated the contours of these limited exceptions and provided specific elements for each. I believe that the majority's approach unnecessarily blurs the lines dividing the exceptions — most notably between the *Burford* and *Pullman* exceptions — and thereby establishes a precedent that takes a substantial step toward creating the proverbial "exception that swallowed the rule." I believe that fidelity to the general rule obliging federal courts to exercise their jurisdiction requires a careful analysis of each doctrine's applicability. That analysis leads me to conclude that none of the abstention exceptions are applicable here.

IV.

The Supreme Court has summarized the *Burford* doctrine as follows:

> Where timely and adequate state court review is available, a federal court sitting in equity must decline

> to interfere with the proceedings or orders of state administrative agencies: (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case at bar"; or (2) where "the exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

NOPSI, 491 U.S. at 361.

I agree with my colleagues that timely and adequate state court review has been available to plaintiffs. They have no duty to exhaust their state remedies before pressing forward with their § 1983 claims in the federal court, however, and this is true even though such exhaustion might relieve a federal court of the burden of resolving a constitutional issue in the § 1983 case. *See Patsy*, 457 U.S. at 515; *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 236-37 (1984); *Marks v. Stinson*, 19 F.3d 873, 882 (3d Cir. 1994).

The District Court found, and appellees contend, that abstention was appropriate here under the second prong of the *Burford* doctrine — i.e., because federal review would disrupt state efforts to establish a coherent policy on a matter of substantial public concern.

There is no dispute in this case that the legislative scheme reflected in AICRA and the implementing regulations constitutes a complex regulatory scheme covering a subject matter in which the state has very important interests. It is also indisputable that a federal court declaration in this case that these regulations violate the federal constitution and an injunction preventing their implementation would disrupt this state regulatory scheme. These undisputed facts do not alone make *Burford* abstention appropriate, however. "While *Burford* is concerned with protecting state administrative processes from undue federal interference, it does not require abstention whenever there exists such a process . . . ." *NOPSI*, 491 U.S. at 362. And "there is, of course, no doctrine requiring abstention merely because resolution of

a federal question may result in the overturning of a state policy." *Zablocki*, 434 U.S. at 379-80 n.5.

Burford is thus not directed to the disruption that comes from a one-time federal declaration that a state program is unconstitutional. As the above quoted portion of *NOPSI* indicates, it is concerned rather with cases in which a federal court will be called upon to resolve issues involving policy judgments that should be reserved for state officials who gain special competence from administering and developing the regulatory process. As then judge, now Justice Breyer explained in a very similar context in *Bath Mem. Hosp. v. Maine Health and Fin. Comm'n*, 853 F.2d 1007 (1st Cir. 1988), the threat to which *Burford* is directed is an "institutional" one:

> Federal courts abstained in Burford, and in similar cases, such as [*Alabama Public Serv. Comm'n v. S. Ry. Co.*, 341 U.S. 341 (1951)] and [*Allstate Ins. Co. v. Sabbagh*, 603 F.2d 228 (1st Cir. 1979)] when they feared that excessive federal court intervention unnecessarily threatened to impede significantly the ongoing administration of a state regulatory system. The threatened interference did not consist merely of the threat that the federal court might declare the *entire state system* unconstitutional; that sort of risk is present whenever one attacks a state law on constitutional grounds in a federal court. Rather, in our view, abstention in the *Burford* line of cases rested upon the threat to the proper administration of a *constitutional* state regulatory system. The threat was that the federal court might, in the context of the state regulatory scheme, create a parallel, additional, federal, 'regulatory review' mechanism, the existence of which would significantly increase the difficulty of administering the state regulatory scheme. It was this special and unusual "institutional threat" that, in our view, led the federal courts to abstain.
>
> To be more specific, in *Burford*, the plaintiff, invoking diversity jurisdiction, asked a federal court to decide that, as a matter of state law, it was entitled to a state oil permit that would have given it a right to remove oil through its wells from a field where large numbers of

> other producers also had wells. A state agency, the Texas Railroad Commission, was in charge of deciding just who could withdraw what oil from a commonly drilled field, a highly technical question, and one of great local importance, for the Texas Railroad Commission, through this regulation, sought to impose restrictions on supply that would keep interstate oil prices high. . . . Because of the need, in terms of both economics and equity, to achieve a consistent set of decisions (and the fact that changing economic conditions could require rapidly changing decisions) the state statute had centralized all judicial review in a single Texas state court. As the Supreme Court pointed out, in these circumstances, the presence of a federal court as an independent forum of review for individual licensing decisions based on a balancing of factually-based local interests created a risk of inconsistency (between diversity cases and others) that could have threatened the viability of the Texas regulatory scheme.

Bath, 853 F.2d at 1013-14 (citations omitted) (emphasis in original).

Here, as in *Bath*, the "plaintiffs do not seek individualized review of fact . . . specific regulatory decision making. To the contrary, they attack the [regulations] as [they are] written. . . . Review here would not threaten to create in the federal court a parallel regulatory review institution. The risks of interference here seem no greater than those present whenever a federal court decides whether a state regulatory statute is constitutional." *Id.* at 1014-15.

If we were to allow the District Court to proceed in this matter, it would be called upon, insofar as the substantive due process and equal protection claims are concerned, to do nothing more (and nothing less) than look at the text of the regulation and ask whether a rational rule maker could possibly conclude that the challenged provisions would in some way serve the legitimate governmental interest identified by the state in response to the challenge. *See United States v. Williams*, 124 F.3d 411, 422 (3d Cir. 1997) (equal protection); *Alexander*, 114 F.3d at 1406 (substantive due process). This extremely deferential rational basis review is *deliberately designed to constrain a federal court*

from resolving an issue of state policy — if the court *can conceive of any rational basis* for the policy choice made in the challenged regulatory provision there is no constitutional violation and the case is over.

With respect to plaintiffs' procedural due process claim, the District Court would be called upon to determine whether the arbitration process provides a fair opportunity for health care practitioners to contest the medical treatment judgments of the PIP carrier. Again, this would involve examining facially the procedure provided to determine whether it comports with the minimum procedural due process required by the Fourteenth Amendment. *See Mathews v. Eldridge*, 424 U.S. 319, 325 (1976). I fail to see how performing this task will in any way "be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *NOPSI*, 491 U.S. at 361.

While the claims in this case and the state proceeding are distinct, they do deal with the same subject matter and it is conceivable that the Appellate Division may consider arguments and issues similar to those that will be involved here. We have clearly held, however, that parallel proceedings dealing with the same subject matter are not a basis for abstention. *Marks*, 19 F.3d at 881. *Burford* is implicated only when there are issues that the federal court would have to resolve in the federal proceeding that should be reserved for a state tribunal having special competence to resolve them. The issues here are conventional challenges based on the federal constitution, and the Appellate Division, while as competent, is no more competent than the District Court to resolve those issues.[2]

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2. The Court distinguishes the closely analogous *Bath* case on the ground that plaintiffs here "attack [on due process and equal protection grounds] only discrete portions of regulations promulgated by the Commissioner, not the legislature." Slip Op. at 14. It fails to explain, however, how adjudication of the constitutional issues here posed to the District Court would be any more disruptive of the state's ability to develop coherent policy than adjudication of the issues presented to the federal court in *Bath*.

V.

In *Artway v. Attorney Gen. of N.J.*, 81 F.3d 1235 (3d Cir. 1996), we explained *Pullman* abstention as follows:

> Under our jurisprudence, a district court must make three findings in order to justify the *Pullman* exception to the general rule that federal courts must hear cases properly brought within their jurisdiction. *The Court must find (1) that uncertain issues of state law underlie the federal constitutional claims brought in the district court; (2) that the state law issues are amenable to a state court interpretation that would obviate the need for, or substantially narrow, adjudication of the federal claim; and (3) that important state policies would be disrupted through a federal court's erroneous construction of state law.* If all three factors are present, the federal court must then consider whether abstention is appropriate by weighing such factors as the availability of an adequate state remedy, the length of time the litigation has been pending, and the impact of delay on the litigants.

Artway, 81 F.3d at 1270 (citations omitted) (emphasis added).

Thus, *Pullman* abstention is applicable only in the narrow category of cases in which a federal court will have to determine an uncertain issue of state law in the course of reaching a federal constitutional issue and important state policies would be frustrated should the federal court err in deciding that issue. While DOBI repeats many times in its brief that the federal court here would have to interpret the statute and the regulations, it has not identified a single specific issue of state law that is both unclear and relevant to the issues the federal court has been asked to address. *Pullman* abstention, accordingly, would be inappropriate here.

Were it true, as the Court suggests, that *Burford* allows a federal court to decline to exercise jurisdiction whenever a state court's decision might "avert the need to delve into constitutional issues," slip op. at 7, *Pullman* abstention would serve no purpose. One would never need to ask whether there are unclear questions of state law, the

resolution of which would be material to the constitutional issues presented in the federal proceeding. *Burford* abstention would be appropriate even in the absence of such issues.

VI.

In *Frank Russell Co. v. Wellington Mgmt.*, 154 F.3d 97, 106 (3d Cir. 1998), we summarized *Younger* as "prohibit[ing]" a "federal court from enjoining an on-going state action" if "(1) there is an on-going state judicial proceeding; (2) the state proceeding implicates an important state interest, and (3) the state proceeding provides an adequate opportunity to raise the constitutional issue." As we said in *Marks*, however, "while a proponent of abstention must show [these three circumstances exist], such a showing does not *require* that the federal court abstain." *Marks*, 19 F.3d at 882 (emphasis supplied).

The teachings of *Marks* are helpful here. First, *Marks* explains that the key to *Younger* abstention is not the presence of parallel state proceedings, but rather the likelihood that the federal action will interfere with the ongoing state proceedings. "This is true even in cases where there exists a 'potential for conflict in the results of adjudications.'" *Id.* at 882 (quoting *Colorado River*, 424 U.S. at 816). After all, as *Marks* reminds, "[a] federal plaintiff may pursue parallel actions in the state and federal courts so long as the plaintiff does not seek relief in the federal court that would interfere with the state judicial process." *Id.* at 885.

Even though the plaintiffs in *Marks* sought injunctive relief from the federal court, abstention under *Younger* was not justified. As we explained,

> [*Marks* was] not a case in which the federal plaintiffs are seeking relief which will in any way impair the ability of the state courts of Pennsylvania to adjudicate anything that is currently before them. When [Marks'] suit was filed, plaintiffs . . . had instituted two proceedings challenging the election, both of which were then before the Court of Common Pleas. The federal suit did not directly or indirectly ask the court

> for any relief with respect to those state proceedings. The plaintiffs were simply pursuing parallel tracks seeking consistent relief in the federal and state systems.

Id. at 884. The same is true here. Plaintiffs do not seek to enjoin a state judicial proceeding or to enjoin enforcement of a state judicial decree. *Younger* abstention would thus violate the District Court's duty to resolve federal claims.

VII.

The "threshold inquiry that must be decided in any *Colorado River* abstention case is whether the two actions are 'parallel.' " *Ryan v. Johnson*, 115 F.3d 193, 196 (3d Cir. 1997). If they are not, the District Court lacks the power to abstain. "Generally, cases are parallel when they involve the same parties and claims." As we explained in *Trent v. Dial Med. of Fla., Inc.*, "it is important that only truly duplicative proceedings be avoided. When the claims, parties or requested relief differ, deference may not be appropriate." *Trent*, 33 F.3d 217, 224 (3d Cir. 1994) (quoting *Complaint of Bankers Trust Co. v. Chatterjie*, 636 F.2d 37, 40 (3d Cir. 1980)).

The state and federal proceedings here are not parallel. As I have explained, the state proceeding involves only state law challenges to the regulations, while the federal proceeding involves only federal constitutional issues. As a result, *Colorado River* abstention is inapposite here.

VIII.

The District Court had an obligation to entertain and resolve plaintiffs' constitutional claims. It lacked authority to abstain. Accordingly, I would reverse its order of dismissal and remand this case for proceedings, including prompt consideration of plaintiffs' application for a preliminary injunction.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 98-4986 (JBS)

CHIROPRACTIC AMERICA, et al;
Plaintiffs

v. APPENDIX B

JAYNEE LAVECCHIA, COMMISSIONER, DEPARTMENT OF BANKING & INSURANCE DONALD BRYAN, ASSISTANT COMMISSIONER FOR LEGISLATIVE AND REGULATORY AFFAIRS, CHRISTINE TODD WHITMAN, GOVERNOR OF NEW JERSEY,
Defendants.

District Judge: Hon. Jerome B. Simandle

APPEARANCES:

Edward S. Hochman, Esquire
744 Broad Street, Suite 701
Newark, New Jersey 07102

and

Richard A. Jaffe, Esquire
5 Greenway Plaza, Suite 1710
Houston, Texas 77046

Attorneys for Plaintiffs

Peter Verniero,
Attorney General of New Jersey
By: John C. Grady, Deputy Attorney General
R.J. Hughes Justice Complex
P.O. Box 117
Trenton, New Jersey 08625
Attorneys for Defendants

SIMANDLE, District Judge:

This case involves a federal constitutional challenge to recently promulgated regulations governing the medical insurance benefits available to automobile accident victims under New Jersey's newly reformed no-fault automobile insurance law. Presently before the court re defendants' motions to dismiss plaintiffs' First Amended Complaint for lack of subject matter jurisdiction and/or for failure to state a claim upon which relief can be granted, pursuant to Federal Rule of Civil Procedure 12(b)(1) and/or (6), and/or to dismiss the First Amended Complaint under a variety of abstention doctrines.

Because the court finds that plaintiffs have adequately invoked the jurisdiction of this court by asserting claims for alleged violations of the due process and equal protection clauses of the Fourteenth Amendment and that plaintiffs have standing, the court denies defendants' motions to dismiss for lack of subject matter jurisdiction and lack of standing. However, because the court finds that timely and adequate state court review of the challenged regulations is available to plaintiffs, and that federal judicial review of the challenged regulations of the state regulatory agency may disrupt New Jersey's attempt to ensure a coherent policy in its treatment of the substantial local problem of automobile insurance reform, the court dismisses plaintiffs' First Amended

Complaint under the Burford abstention doctrine. For the reasons that follow, it is apparent that the Appellate Division of the Superior Court of New Jersey is the appropriate forum for adjudicating these issues.

BACKGROUND

Plaintiffs in this matter are professional organizations that represent chiropractors and/or individual chiropractors who practice in New Jersey.[1] They challenge the

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[1] Plaintiff Chiropractic America is the trade name of a Nevada corporation with its principal place of business in Pennsauken, New Jersey, that is devoted to the promotion of chiropractic care and counts approximately forty New Jersey chiropractors among its members. Plaintiff Monmouth County Chiropractic Society is a not for profit association that represents the interests of approximately 400 chiropractors from the Monmouth County area. Plaintiff South Jersey Chiropractic Society is a not for profit association that represents the interests of approximately 300 chiropractors from South Jersey. Plaintiff Northern Jersey Chiropractic Society, Inc., is a not for profit corporation that represents the interests of approximately 400 chiropractors in North Jersey. Plaintiff Cumberland County Chiropractic Society is an association that represents the interests of approximately 15 chiropractors who reside

constitutionality of certain regulations[2] recently promulgated by defendant Jaynee LaVecchia, Commissioner of the Department of Banking and Insurance ("DOBI"), ("the Commissioner"), pursuant to authority granted to her by the Automobile Insurance Cost Reduction Act ("AICRA"), P.L. 1998, Chapters 21 and 22, codified at N.J.S.A. 39:6A-1.1 (1998 N.J. Sess. Laws Vol. 2)[3]

The Legislature of the State of New Jersey enacted AICRA on May 19, 1998 in an effort to create a comprehensive scheme to reform private passenger automobile insurance in New Jersey. The Legislature's primary goal in enacting AICRA was to reduce the high cost of automobile insurance in New Jersey. See Generally N.J.S.A. 39:6A-1.1. The Legislature attempted to achieve this goal by, among other things, revising the state's method of providing first-party no-fault insurance personal injury protection ('PIP") benefits to victims of automobile accidents. To that end, AICRA provides, in pertinent part, that:

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in Cumberland County. Plaintiffs Jeffrey McGunnigle, D.C., Richard E. Glass, D.C., and Christopher T. Taylor, D.C., are chiropractors who practice in New Jersey.

[2] N.J.A.C. 11:3-4 and 3-5, published at 30 N.J.R. 4401(a).

[3] Also named as defendants are Donald Bryan, Deputy Commissioner of the Department of Banking and Insurance, and Christie Whitman, Governor of the State of New Jersey.

Benefits provided under basic coverage shall be in accordance with a benefit plan provided in the policy and approved by the commissioner. The policy form, which shall be subject to the approval of the commissioner, shall set forth the benefits provided under the policy, including eligible medical treatments diagnostic tests and services as well as such other benefits as the policy may provide. The commissioner shall set forth by regulation a statement of the basic benefits which shall be included in the policy. Medical treatments, diagnostic tests, and services provided by the policy shall be rendered in accordance with commonly accepted protocols and professional standards and practices which are commonly accepted as being beneficial for the treatment of the covered injury. Protocols and professional standards and practices which are deemed to be commonly accepted pursuant to this section shall be those recognized by national standard setting organizations, national or state professional organizations of the same discipline as the treating provider, or those designated or approved by the commissioner in consultation with the professional licensing boards in the Division of Consumer Affairs in the Department of Law and Public Safety. The commissioner, in consultation with the Commissioner of the Department of Health and Senior Services and the applicable licensing boards, may reject the use of protocols, standards and practices or lists of diagnostic tests set by any organization deemed not to have standing or general recognition by the provider community or the applicable licensing boards. Protocols shall be deemed to establish guidelines as to standard appropriate treatment and diagnostic tests for injuries sustained in automobile accidents, but the establishment of standard treatment protocols or protocols for the administration of diagnostic tests shall not be interpreted

in a such a manner as to preclude variance from the standard when warranted by reason of medical necessity

N.J.S.A. 39:6A-3.1 (4) (a). AICRA defines "medically necessary" as follows:

> "Medically necessary" means that the treatment is consistent with the symptoms or diagnosis, and treatment of the injury (1) is not primarily for the convenience of the injured person or provider, (2) is the most appropriate standard or level or service which is in accordance with standards of good practice and standard professional treatment protocols, as such protocols may be recognized and designated by the Commissioner of Banking and Insurance, in consultation with the Commissioner of Health and Senior Services or with a professional licensing or certifying board in the Division of Consumer Affairs in the Department of Law and Public Safety, or by a nationally recognized professional organization, and (3) does not involve unnecessary diagnostic testing.
>
> N.J.S.A. 39:6A-2m.

AICRA authorized the Commissioner to "enlist the services of a benefit consultant in establishing the basic benefits level" of coverage. N.J.S.A. 39:6A-3.1(4)(a). Accordingly, the Commissioner retained the firm of PriceWaterhouseCoopers ("PWC") to assist DOBI in carrying out the Legislature's directive to determine and establish protocols and standard treatments and practices for specified diagnosed injuries.

On September 8, 1998, the Commissioner published the proposed regulations DOBI developed in conjunction with PWC pursuant to the authority granted by

AICRA. See 30 N.J.R. 3211. The Commissioner also extended the public comment period from October 8, 1998 through November 4, 1998, and held a public hearing on November 4, 1998. See 30 N.J.R. 3748(a). After making certain minor changes to the original proposed regulations, the Commissioner signed the regulations for adoption on November 30, 1998. See 30 N.J.R. 4401(a). The regulations became effective on December 21, 1998 and will become operative on March 22, 1999. See id.

The primary feature of the regulations is the creation of six so-called "care paths" that designate the appropriate treatment for certain particularized back injuries. See N.J.A.C. 11:3-4. The regulations also provide a system for resolving disputes about the medical necessity of care that deviates or exceeds the type or degree of care designated in the six care paths, culminating in arbitration. See N.J.A.C. 11:3-5.

on November 4, 1998, plaintiff Chiropractic America commenced this action by filing a Complaint challenging the constitutionality of the regulations. On January 12, 1999, Chiropractic America and the other plaintiffs filed a First Amended Complaint. Plaintiffs allege that three of the six care paths (care path 2: cervical spine herniated disc/radiculopathy; care path 4: thoracic spine herniated disc/radiculopathy; and care path 6: lumbar spine herniated disc/radiculopathy) completely eliminate the availability of reimbursable chiropractic care for automobile accident victims, while the remaining three care paths (care path 1: cervical spine strain/sprain/ contusion whiplash of the neck; care path 3: thoracic spine strain/sprain/contusion of the upper back; and care path 5: lumbar sacral spine strain/sprain/contusion) restrict the number of chiropractic care visits available without pre-approval from the insurer to twelve in the first month. See First Amended Complaint at 11 26-26, 30-31. Plaintiffs claim that the care paths "are inconsistent with the standard of chiropractic care in the State of New Jersey" and "are arbitrary and capricious and

violate federal substantive due process principles." Id. at ¶ 37. Furthermore, plaintiffs claim that the arbitration provisions of the regulations are designed in such a way as to make it all but impossible for an insured or a medical provider to successfully challenge an insurer's refusal to approve care that deviates from or exceeds the care paths. Id. at ¶¶ 52-59. Thus, plaintiffs claim that they 'will surely be placed in the intolerable position of choosing between providing necessary care without compensation, or substandard care mandated by the care paths." Id. at ¶ 60.

In the First Count of the First Amended Complaint, plaintiffs seek a declaratory judgment "that the regulations violate the substantive due process rights of chiropractors and their patients" because "the care paths and the arbitration provisions are unreasonable and capricious and do not bear a rational relationship to the legitimate aim of the enabling legislation" and because they "appear to be targeted at restricting chiropractic care to accident victims" and "manifest a bias and bad faith towards chiropractors and accident victims who opt to undergo chiropractic care." Id. at ¶ 64. Plaintiffs also allege that "[t]he elimination of chiropractic care for auto accident victims with herniated discs or radiculopathy [care paths 2, 4 and 6] is an irrational and arbitrary restriction on the ability of chiropractors to perform chiropractic services within the scope of chiropractic practice in the State of New Jersey" in violation of their substantive due process and equal protection rights. Id. at ¶ 65.

In the Second Count of the First Amended Complaint, plaintiffs "seek a declaration that the arbitration provisions contained in the proposed regulations violate the procedural due process rights of chiropractors and their patients in that they deny health care practitioners any practical right to contest the medical treatment judgments of the PIP carriers." Id. at ¶ 71.

In the Third Count of the First Amended Complaint, plaintiffs seek a permanent injunction banning the implementation of the regulations as they pertain to chiropractors. Id. at ¶ 73.

In addition to this federal action, plaintiffs have filed a notice of appeal challenging the regulations in the Superior Court of New Jersey, Appellate Division, pursuant to Rule 2:2-3(a)(2). The state court appeal filed by plaintiffs is one of four appeals challenging the regulations that are currently pending in the Appellate Division, the others having been filed by the Association of Lawyers of America - New Jersey, which filed two appeals, and a consortium of health care providers including the New Jersey Coalition of Health Care Professionals, Inc., Physicians for Quality Care, Inc., and Physicians Union of New Jersey, Local Lodge 8. See Certification of John C. Grady, dated January 25, 1999.

DISCUSSION

A. Subject Matter Jurisdiction and Standing

As a threshold matter, the court must address defendants' contention that it should dismiss the First Amended Complaint for lack of subject matter jurisdiction and/or for failure to state a claim upon which relief can be granted, pursuant to Rule 12(b) (1) and/or (6), because plaintiffs have failed to adequately plead a cause of action under the due process and equal protection clauses of the Fourteenth Amendment and/or because plaintiffs lack standing.

The court finds no merit in defendants' argument that plaintiffs have not adequately invoked the jurisdiction of this court. Plaintiffs invoke federal question jurisdiction under 28 U.S.C. § 1331, and civil rights jurisdiction under 28 U.S.C. § 1343(3) & (4), pleading claims under 42 U.S.C. § 1983 and the

Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202. See First Amended Complaint at ¶ 5. Plaintiffs have alleged violations of their constitutional rights to substantive and procedural due process and equal protection of the law. See First Amended Complaint at ¶¶ 64-65, 71. Defendants were clearly put on notice of and obviously had no difficulty in understanding the nature of plaintiffs' claims against them and the grounds upon which those claims rest. That is all that is required at this stage of the proceeding. See Nami v. Fauver, 82 F.3d 63, 65 (3d Cir. 1996). Without determining at this time whether the First Amended Complaint is subject to dismissal for failure to state a claim upon which relief can be granted under Rule 12(b)(6), this court concludes that it has subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343(3) & (4).

At this early stage, the court also finds no merit in defendants' argument that plaintiffs lack standing. In order to have standing, a plaintiff must: (1) have suffered an "injury in fact," i.e., an invasion of a legally protected interest that is both (a) concrete and particularized and (b) actual or imminent, as opposed to conjectural or hypothetical; that was (2) caused by or fairly attributable to the challenged action of the defendant; and that is (3) likely redressable by a favorable decision. See Lulan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). Additionally, an organization may have standing to represent its members when: (1) the organization's members would have standing to sue on their own; (2) the interest that the organization seeks to protect is germane to its purpose; and (3) neither the claims asserted nor the relief requested require individual participation by the organization's members. Chiropractic Alliance of New Jersey v. Parisi, 854 F. Supp. 299, 307 (D.N.J.1994)(citing Public Interest Research of New Jersey v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 70 (3d Cir. 1990), cert. denied, 498 U.S. 1109 (1991)).

"At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may

suffice." Lulan, 504 U.S. at 561. In this case, plaintiffs allege that they "will surely be placed in the intolerable position of choosing between providing necessary care without compensation, or substandard care mandated by the care paths" if the regulations are implemented. See First Amended Complaint at ¶ 60. At this stage of the proceeding, the court finds this allegation sufficient to confer standing on plaintiffs. The Legislature recognized that chiropractors and other healthcare professionals have an interest in the subject matter of the challenged regulations when, in enacting AICRA, it required DOBI to consult with the professional licensing boards in the Division of Consumer Affairs in the Department of Law and Public Safety, including the State Board of Chiropractic Examiners, in developing the protocols, standard treatments and approved diagnostic procedures. See N.J.S.A. 39:6A-3.14(a). The court construes the First Amended Complaint as an attempt to protect this interest.

In sum, the court finds that it has subject matter jurisdiction, and that plaintiffs have standing. Accordingly, the court denies defendants motion to dismiss the First Amended Complaint under Rule 12(b) (1) for lack of subject matter jurisdiction or standing. Because this court, for the reasons set forth below, has determined that it shall abstain from reaching the merits of plaintiffs' claims, the court does not address defendants' motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6).

B. Abstention

Having determined that it has jurisdiction, the court now considers whether it should abstain from exercising that jurisdiction, as urged by defendants.

In Burford v. Sun Oil Co., 319 U.S. 31S (1943), the U.S. Supreme Court articulated for the first time a doctrine

of abstention based on the principle that a federal court should avoid exercising its jurisdiction in a manner that would likely interfere with a state's attempt to regulate in a substantive area of predominate state interest where timely and adequate state court review of the challenged regulatory action is available. In its present formulation, the so-called Burford doctrine of abstention provides:

> Where timely and adequate state court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case at bar"; or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

New Orleans Public Service, Inc. v. Council of City of New Orleans, 491 U.S. 350, 361 (1989)("NOPSI")(quoting Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814(1976)).

In the present case, defendants argue that Burford abstention is appropriate because federal review of the challenged regulations would disrupt New Jersey's effort to reform its no-fault automobile insurance law, an area of predominate state interest. Plaintiffs respond by arguing that timely and adequate state court review is not available under the circumstances of this case, and that this court's adjudication of the their federal constitutional claims will not unnecessarily involve the court in parallel review of state regulations.

For the following reasons, the court finds that

abstention is appropriate under the second prong of the NOPSI test because (1) timely and adequate state court review is available to plaintiffs, and (2) this court's review of plaintiffs' claims would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.

1. Availability of Timely and Adecruate State Court Review

The first step in the Burford abstention analysis is whether "timely and adequate state-court review" is available. Riley v. Simmons, 45 F.3d 764, 771 (3d Cir. 199S). "Only if a district court determines that such review is available, should it turn to the other issues." Id.

In New Jersey, appeals may be taken in the Appellate Division as of right under Rule 2:2-3(a)(2) "to review final decisions or actions of any state administrative agency or officer, and to review the validity of any rule promulgated by such agency or officer." The Appellate Division's scope of review on appeal under Rule 2:2-3(a)(2)

> is generally restricted to three inquiries: (1) whether the agency's action violates the express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency bases its action; and (3) whether, in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.

Matter of Musick, 143 *N.J.* 206, 216 (1996)(citing Campbell v. Dept. of Civil Serv., 39 N.J. 556, 562 (1963)).

Plaintiffs have filed an appeal of the regulations

at issue in this case in the Appellate Division under Rule 2:2-3(a)(2), as have three other appellants. However, plaintiffs argue that timely and adequate state court review is not available in this case because (1) the Appellate Division will not be able to rule before the regulations become effective on March 22, 1999 and (2) the Appellate Division is unable to hold an evidentiary hearing. Neither argument is valid.

The Appellate Division has the power to accelerate an appeal and/or to stay agency action pending appeal. Under Rule 2:9-2, the usual briefing and oral argument schedule "may be accelerated on the court's own motion or on the motion of any party." Under Rule 2:9-7, "[o]n or after the filing with the Appellate Division of a notice of appeal . . . from a state administrative agency or officer, a motion for ad interim relief or for a stay of the decision, action or rule under review shall be made in the first instance to the agency whose order is appealed from and, if denied, to the Appellate Division."

The Appellate Division also has the power to permit supplementation of the record on appeal, including the presentation of live witnesses before a designated judge of the Superior Court. Rule 2:5-5(b) provides:

> At any time during the pendency of an appeal from a state administrative agency, if it appears that evidence unadduced in the proceedings below may be material to the issues on appeal, the appellate court, on its own motion or on the motion of any party, may order, on such terms as it deems appropriate, that the record on appeal be supplemented by the taking of additional evidence and the making of findings of fact thereon by the agency below or, in exceptional instances, by a judge of the Superior Court especially designated for that purpose.

Rule 2:5-5(b).

Although plaintiffs acknowledge the existence of these procedural devices, they have declined to utilize them to seek an expeditious review of their claims in the Appellate Division based on their unsubstantiated belief that their effort would be futile when, in fact, the Appellate Division has on appropriate occasion moved swiftly to invalidate agency action that was inconsistent with its purported enabling legislation.

For example, in Matter of Commissioner of Insurance, 256 N.J. Super. 158 (App. Div. 1992), aff'd, 132 *N.J.* 209 (1993), approximately 20 insurance companies appealed a March 24, 1992 Order issued by the Commissioner of Insurance declining to implement an April 1, 1992 rate increase requested by the Market Transition Facility ("MTF") to meet a shortfall in automobile insurance premiums and instead creating a program of "transitional assessments" against insurers who failed to write their share of MTF depopulation business to raise MTF revenues and defray the MTF deficit. The Commissioner planned to call for the new assessment payments in May or early June 1992. Id. at 160.

The appellants moved to accelerate their appeals and to stay the March 24, 1992 Order. Id. Noting that "[t]he need for a prompt disposition was apparent to all parties," the Appellate Division on April 10, 1992 ordered that briefs be exchanged on April 20, 1992 and that oral argument be heard on April 24, 1992. Id. at 160-61. Because "[a]cceleration of the appeals made less urgent the insurers' motions for stays," the court denied those motions. Id. at 161. The court did, however, issue its Opinion invalidating the March 24, 1992 order on May 1, 1992 -- just one week after it heard oral argument on April 24, 1992 and less than five weeks after the filing of the notices of appeal. Id. at 158, 160-61.

In another instance, although it ultimately affirmed the challenged agency action, the Appellate Division also moved quickly in Monmouth Medical Ctr. v. State Dept. of Health, 272 N.J. Super. 297 (App. Div.), certif. denied, 137 N.J. 310 (1994), where a number of hospitals challenged regulations adopted by the Department of Health that imposed a moratorium upon the consideration of certificate of need applications for cardiac services pending the completion of certain studies relating to the need for such services. The Department of Health proposed the regulations on August 16, 1993. Id. at 303. In October 1993, two hospitals filed actions in lieu of prerogative writs in the Superior Court, Law Division, seeking to enjoin the Department of Health from formally adopting the proposed regulations and to compel the Department of Health to process their certificate of need applications, which had been pending when the regulations were proposed. Id. at 304. Finding that it lacked subject matter jurisdiction, the Law Division transferred the actions to the Appellate Division, where they should have been filed originally. Id.

After the transfer, the hospitals moved to stay the adoption of the proposed regulations and for other injunctive relief relating to the processing of certificate of need applications. Id. The Appellate Division denied the motions, but accelerated the appeals. Id. The proposed regulations were adopted and became effective on December 20, 1993. Id. The court heard oral argument on January 19, 1994 and issued its written opinion affirming the adoption of the regulations less than ten weeks later, on March 31, 1994. Id. at 297.

In light of these demonstrations of the Appellate Division's willingness and ability to move rapidly in appropriate cases, plaintiffs' skepticism about their ability to receive prompt review of their claims in the Appellate Division is unfounded, and their contention that "timely and adequate

state-court review" of the challenged regulations is unavailable is without merit.

2. Coherent State Policy and the Public Interest

The Supreme Court has acknowledged that federal adjudication of "a claim that a state agency has misapplied its lawful authority or has failed to take into consideration or properly weigh relevant state-law factors" may "disrupt the State's attempt to ensure uniformity in the treatment of an essentially local problem." NOPSI, 491 U.S. at 362. That is exactly the type of claim at issue in the present case, where plaintiffs allege that DOBI acted arbitrarily and capriciously in adopting the challenged regulations.

Furthermore, in Marks v. Snedecker, 612 F. Supp. 1158 (D.N.J. 19BS), this court abstained under Burford in a case involving a federal constitutional challenge to a previous attempt by the Legislature to reform New Jersey's comprehensive automobile insurance law. The plaintiffs in Marks challenged the retroactive surcharge system created by the New Jersey Insurance Reform Act of 1982 and the New Jersey Automobile Full Insurance Availability Act under the due process and e-x Post facto clauses of the federal constitution. Id. at 1160. Judge Cohen found that because the court would have to interpret the statutes in order to address the constitutional questions, the resolution of the constitutional questions "could have a significant disruptive effect on New Jersey's newly reformed automobile insurance program which is unquestionably a matter of substantial public concerns Id. at 1161. Judge Cohen also found that the constitutional analysis would "involve an in-depth analysis of the legislative purposes which underlie a major reform effort in an area of law -- insurance -- which has typically been left to the states to regulate." Id. Thus, the court held that the "'exercise of federal

review of the question in [this] case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.'" Id. (quoting Colorado River, 424 U.S. at 814). The "timely and adequate state-court review" test was satisfied because persons aggrieved by the challenged surcharge provision had the ability to file an expedited appeal directly in the Appellate Division, and eight such appeals were already pending in the Appellate Division. Id. at 1162.

As in Marks, analysis of the constitutional questions raised in this case would involve an in-depth analysis of the legislative purposes of AICRA, a major reform effort in an area of law -- automobile insurance -- that has typically been left to the states to regulate. See Lac D'Amiante du Quebec v. American Home Assurance Co., 864 F.2d 1033, 1038-39 (3d Cir. 1988)("the states have assumed the primary role in regulating insurance"). This case requires an analysis of whether the challenged regulations, as they apply to chiropractors and their patients, are consistent with the Legislature's attempt in enacting AICRA to reform New Jersey's comprehensive no-fault automobile insurance law so as to reduce the high cost of automobile insurance in New Jersey, or whether chiropractors and their patients have been unfairly singled out for unfavorable treatment. The outcome of this inquiry turns upon an assessment of the rationality of the basis for the regulations, which involves an examination of the administrative procedure and the substantive result of the state regulatory scheme. Unlike in cases where the state regulations under constitutional review were enacted to comply with a federal mandate in the particular regulatory field, See, e.g., New Jersey Hospital Assoc. v.Waldman, 73 F.3d 509 (3d Cir. 1995) (involving a due process challenge to a state agency's reduction in Medicaid reimbursement rates mandated by the Boren Amendments to the Medicaid Act, 42 U.S.C. § 1396 (a)(13)(A)), there is no federal interest in the regulation of

automobile insurance, an area in which Congress has deferred to the states. See Lac D'Amiante, 864 F.2d at 1038-39 (discussing the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15, which provides for exclusive state regulation of the business of insurance).

Furthermore, as in Marks, the resolution of the constitutional questions could have a significant disruptive effect on the newly reformed automobile insurance program created by AICRA, which is unquestionably a matter of substantial public concern. This is especially so in light of the fact that plaintiffs have standing to challenge the regulations only insofar as they affect chiropractors and their patients, while there are presently three other appeals pending before the Appellate Division challenging the regulations as they pertain to other interested parties, including physicians and their patients, attorneys and their clients, and automobile accident victims in general. Under these circumstances, there is a very real possibility of ongoing, contemporaneous, inconsistent verdicts if this court were to adjudicate plaintiffs' claims while the other actions proceed in the Appellate Division.

Finally, as in Marks. and as discussed in more detail above, timely and adequate state court review is available to plaintiffs, and several appeals of the challenged agency action are already pending in the Appellate Division.

For these reasons, the court concludes that Burford abstention is appropriate in this case.[4] When a district

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[4] In light of this holding, the court need not address whether abstention would be appropriate under the Pullman, Younger or Colorado River abstention doctrines.

court decides to abstain on Burford grounds, the proper course is to dismiss the action. See 17A Charles Alan Wright, Arthur R. Miller and Edward H. Cooper, Federal Practice & Procedure 4245 (2d ed. 1988). Accordingly, the court dismisses plaintiffs' First Amended Complaint, without prejudice to plaintiffs' proceedings before the Appellate Division.

CONCLUSION

For the foregoing reasons, the court denies plaintiffs, motion to dismiss for lack of subject matter jurisdiction and/or lack of standing, and grants defendants' motion to dismiss on Burford abstention grounds. The accompanying order is entered.

JEROME B. SIMANDLE
U.S. District Judge

Dated: February 8, 1999

PAUL H. ZOUGEK
Acting Attorney General of New Jersey
Attorney for Defendants Jaynee LaVecchia
Commissioner of Banking & Insurance, et al;
R.J. Hughes Justice Complex
PO BOX 117
Trenton, New Jersey 08625

By: John C. Grady (JG2743)
Deputy Attorney General
(609) 292-1506

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 98-4986 (JBS)

CHIROPRACTIC AMERICA, et al;
Plaintiffs

v.

JAYNEE LAVECCHIA, COMMISSIONER,
DEPARTMENT OF BANKING & INSURANCE
DONALD BRYAN, ASSISTANT COMMISSIONER
FOR LEGISLATIVE AND REGULATORY
AFFAIRS, CHRISTINE TODD WHITMAN,
GOVERNOR OF NEW JERSEY,
Defendants.

ORDER ON MANDATE ENTERING
JUDGMENT DISMISSING THE
COMPLAINT

In accord with the mandate of the United States Court of Appeals for the Third Circuit that the judgment entered by the Dirtrict Court on February 9, 1996 be affirmed and costs taxed against the appellant.

IT IS on this 14th day of June, 1999;

ORDERED that JUDGMENT shall be entered in this matter DISMISSING the complaint and taxing costs against the appellants/plaintiffs; Chiropractic America, Monmouth County Chiropractic Society, Southern Jersey Chiropractic Society, Northern Jersey Chiropractic Society, Cumberland County Chiropractic Society, Christopher T. Taylor, Richard E. Glass and Jeffrey McMunigle.

/S/
Jerome B. Simandle, U.S.D.J.

N.J.C.A. #5 A:\JUDGMENT DISM COMP

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-5060

APPENDIX D

CHIROPRACTIC AMERICA,
Appellant

v.

JAYNEE LAVECCHIA, in her official capacity as Commissioner of Department of Banking and Insurance (DOB&I), and DONALD BRYAN, in his official capacity as Assistant Commissioner for Legislative and Regulatory Affairs of DOB&I, CHRISTIE WHITMAN, in her official capacity as Governor of the State of New Jersey

---

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 98-cv-4986)
District Judge: Hon. Jerome B. Simandle

Present: BECKER, Chief Judge, SLOVITER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH,LEWIS, McKEE, RENDELL, ALDISERT*, Circuit Judges,

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SUR PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

The petition for rehearing filed by appellant having been submitted to the judges who participated in the decision of this court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED. Judges Becker, Sloviter, Stapleton, Mansmann, and Lewis would have granted rehearing.

BY THE COURT:

/S/
Circuit Judge

Dated: May 11, 1999

N.J.C.A. #5 A:\PETITION FOR REHEARING EN BANC

Supreme Court, U.S.
FILED
SEP 7 1999
OFFICE OF THE CLERK

No. 99-237

In the

Supreme Court of the United States

CHIROPRACTIC AMERICA,

Petitioner,

v.

JAYNEE LAVECCHIA, in her official capacity as Commissioner of Department of Banking and Insurance (DOB&I), and DONALD BRYAN, in his official capacity as Assistant Commissioner for Legislative and Regulatory Affairs of DOB&I, CHRISTIE WHITMAN, in her official capacity as Governor of the State of New Jersey,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

JOHN J. FARMER, JR.
Attorney General of New Jersey

ANDREA M. SILKOWITZ
Assistant Attorney General
Of Counsel

JOHN C. GRADY
Deputy Attorney General
Counsel of Record and
On the Brief
Attorneys for Respondents

Hughes Justice Complex
25 Market Street
Post Office Box 117
Trenton, New Jersey 08625
(609) 292-1506

35 pp

QUESTION PRESENTED

1.Whether a Petition for Writ of *Certiorari* should be denied where the lower federal courts, pursuant to Burford abstention principles, declined jurisdiction, despite the allegation of federal constitutional violations, where resolution of the issues alleged in the complaint would require the federal court to interfere with state efforts to regulate in an area of law in which state interests predominate and an adequate and timely state court review was available and pending.

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N.J. Stat. Ann. § 39:6A-3.1(4)(a) (West Supp. 1999) . . 2

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United States Const., Art. IV 22

Erwin Chemerinsky, Federal Jurisdiction 111-12
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Henry Hart & Herbert Wechsler
The Federal Courts and the Federal System,
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STATEMENT OF THE CASE

Petitioner in this matter seeks review of the Third Circuit's decision to affirm the United States District Court for the District of New Jersey's decision to abstain, under Burford, from the exercise of jurisdiction in favor of allowing the pending New Jersey state court review of regulations promulgated by the New Jersey Commissioner of Banking and Insurance ("Commissioner") to implement the state's comprehensive private passenger automobile insurance reform legislation, the Automobile Insurance Cost Reduction Act,("AICRA" or the "Act"), P.L. 1998, c. 21 and 22 as amended by P.L. 1999 c. 52, to proceed to conclusion. The respondents oppose the petition for a writ of *certiorari* to the United States Court of Appeals for the Third Circuit.

By way of background, on May 19, 1998, AICRA was enacted in the State of New Jersey. The Act brought about comprehensive reforms to New Jersey's private passenger automobile insurance system, and the State's no-fault law in order to reduce the escalating costs of such insurance. As part of its many significant reforms, the Act calls upon the Commissioner to promulgate regulations to establish standards against which to measure the medical necessity of treatments and diagnostic testing for purposes of determining reimbursement by private passenger automobile insurers under the first-party personal injury protection medical expense benefit component of the insurance policy. See N.J. Stat. Ann. § 39:6A-1.1 (West Supp. 1999). Petitioners challenged the regulations adopted by the Commissioner to implement this provision of AICRA.

As part of AICRA's legislative findings, the New Jersey Legislature explained that "the substantial increase in the cost

of medical expense benefits indicates that the benefits are being overutilized for the purpose of gaining standing to sue for pain and suffering, thus undermining the limitations imposed by the [verbal] threshold and necessitating the imposition of further controls on the use of those benefits, including the establishment of a basis for determining whether treatments or diagnostic tests are medically necessary." N.J. Stat. Ann. § 39:6A-1.1 (West Supp. 1999). The Legislature also found that the existing arbitration system "has not sufficiently addressed the Legislature's goal of eliminating payment for treatments and diagnostic tests which are not medically necessary, leading to the belief that a revised dispute resolution mechanism needs to be established which will accomplish this goal. N.J. Stat. Ann. § 39:6A-1.1 (West Supp. 1999). Based on this finding, the Legislature directed the Commissioner to define "standard professional treatment protocols" to determine "the most appropriate standard or level of service" for the diagnosis and treatment of certain common automobile injuries. See N.J. Stat. Ann. § 39:6A-2m (West Supp. 1999).

Pursuant to N.J. Stat. Ann. §§ 39:6A-2m and 39:6A-3.1(4)(a) (West Supp. 1999), the Commissioner enlisted the services of a health benefits consultant, conferred with the New Jersey Department of Health and Senior Services and the professional licensing boards of the New Jersey Division of Consumer Affairs, and established standard treatments and diagnostic tests against which the medical necessity of treatments can be measured for purposes of reimbursement under an insurance policy. These standards will serve to combat fraudulent medical claims and the overutilization of medical expense benefits, eliminate unnecessary medical treatment and diagnostic testing and, in turn, eliminate unnecessary costs to the State's private passenger automobile

insurance system. Patients seeking additional treatment, or treatment that otherwise varies from the general guidelines contained in the care paths within the regulations, will receive reimbursement if such treatment is medically necessary and based on objective clinical findings. See, N.J. Admin. Code tit. 11, § 3-4.6(c) (Supp. 3-15-99), and N.J. Admin. Code tit. 11, § 3-4.7(b) (Supp. 3-15-99). The regulations themselves do not determine the extent or type of care to be obtained from or provided by any given provider. Rather, the administrative scheme merely outlines those basic services which carriers must presumptively reimburse to their insureds.

The regulations at issue in petitioner's complaint were the subject of an extensive administrative process. Following initial publication of the rule proposal in the New Jersey Register on September 8, 1998, 30 N.J. Reg. 3211(a) (September 8, 1998), public comment was sought and received during a public comment period which was extended to November 4, 1998. 30 N.J. Reg. 3748(a) (October 19, 1998) The Commissioner also provided notice that she would hold a public hearing on November 4, 1998, in order to elicit testimony from interested parties regarding the rule proposal. A broad spectrum of representatives of health-care providers including physicians, osteopaths, and chiropractors provided written comments and oral testimony regarding the medical protocol regulations. Attorneys, medical and chiropractic associations, insurers and their trade associations, and other interested members of the public also participated in the rulemaking process. Counsel for Chiropractic America and individual members from petitioner's association also voiced their opinions at the public hearing. Before the rules were adopted, the Commissioner revised provisions of the regulations and adjusted the care paths therein to account for

pertinent recommendations made by members of the public and the various State professional licensing boards.

The regulations were adopted by the Commissioner on November 30, 1998, and published in the New Jersey Register and made effective on December 21, 1998. See, 30 N.J. Reg. 4401(a) (December 21, 1998) The regulations became operative on March 22, 1999, generally meaning that reimbursement of medical benefits for all new and renewal automobile insurance policies issued or processed on or after that date will be governed by policy language that reflects the standards established by the medical protocol regulations, N.J. Admin. Code tit. 11, § 3-4 (Supp. 3-15-99). Disputes relating to the payment of personal injury protection benefits for services and treatments rendered under the new policies will be resolved through the new dispute resolution mechanism established by the new regulations, N.J. Admin. Code tit.11, § 3-5 (Supp. 3-15-99). See, note to N.J. Stat. Ann. § 39:6A-1.1 (West Supp. 1999).

On November 4, 1998, before the regulations being challenged had been finally adopted, Chiropractic America prematurely sought federal review of the proposed administrative regulations, 30 N.J. Reg. 3211(a) (September 8, 1998) On December 21, 1998, the respondents moved to dismiss the complaint under Fed. R. Civ. P. 12 (b) (1) and (b) (6) and/or multiple abstention doctrines.[1]

On January 11, 1999, petitioner filed a First Amended Complaint naming various professional organizations and

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[1]L. Civ. R. 7.1(f) and Appendix N. Optional Motion Procedures required that the Notice of Motion not be filed with the Court until the motion was fully briefed. Therefore, it was not filed until January 25, 1999.

individual chiropractors as additional plaintiffs. Petitioner also filed a cross-motion for a plenary hearing on a preliminary injunction in which it sought to enjoin the Commissioner from implementing the newly adopted regulations as they relate to treatments provided or testing conducted by chiropractors.

Shortly thereafter, on January 13, 1999, petitioner filed a notice of appeal in the New Jersey Superior Court, Appellate Division, challenging N.J. Admin. Code tit. 11, § 3-4 (Supp. 3-15-99). This appeal joined two others which had been filed after the regulations were adopted and before Chiropractic America filed its First Amended Complaint in federal court. On January 7, 1999, the New Jersey Coalition of Health Care Professionals, et al., ("Coalition") filed a notice of appeal with the New Jersey Superior Court, Appellate Division, challenging the validity of N.J Admin. Code tit. 11, § 3-4. On January 8, 1999, the Association of Trial Lawyers of America - New Jersey, ("ATLA") filed a notice of appeal challenging the same regulation. On that same date, ATLA filed another notice of appeal to challenge portions of N.J. Admin. Code tit. 11, § 3-3, governing the basic policy, and N.J Admin. Code tit. 11, § 3-5, governing the alternative dispute resolution process. On February 16, 1999, the Appellate Division granted ATLA's unopposed application to consolidate its appeal from N.J. Admin. Code tit. 11, § 3-4 with that filed by the Coalition. The Appellate Division then consolidated all appeals, sua sponte.

In the interim, the district court severed the respondents' motion to dismiss and the petitioner's cross-motion for a plenary hearing, and heard oral argument on the motion to dismiss on February 5, 1999. At the conclusion of the oral argument, the district court entered an order dismissing the

matter on Burford abstention grounds. Burford v. Sun Oil Co., 319 U.S. 315 (1943). Pa-Appendix B at 30a.[2]

Petitioner filed a notice of appeal from the district court's decision on February 11, 1999. On petitioner's motion, the United States Court of Appeals for the Third Circuit accelerated the matter and directed that briefs be exchanged on or before February 24, 1999. Oral argument was heard on March 2, 1999.

On April 14, 1999, the United States Court of Appeals for the Third Circuit affirmed the district court decision to abstain from the exercise of jurisdiction on Burford abstention grounds. A Petition for Rehearing and Suggestion for Rehearing En Banc was denied on May 11, 1999. A Final Order on the Mandate of the Third Circuit was entered on June 14, 1999.

While the federal proceedings made their way through the district court and the Court of Appeals, the state court appeals, to which petitioner was a party, proceeded. On January 28, 1999, the Commissioner denied the Coalition's motion to stay the March 22, 1999 implementation of N.J. Admin. Code tit. 11, § 3-4 (Supp. 3-15-99) pending the outcome of the appeal. On March 1, 1999, the Coalition filed an emergent application with the New Jersey Superior Court Appellate Division to stay implementation of N.J. Admin. Code tit. 11, § 3-4 (Supp. 3-15-99). ATLA joined this application. Thereafter, the Appellate Division granted the

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[2]The decision of the Third Circuit Court of Appeals is contained in Appendix A to the petition for *certiorari*, while the decision of the District Court is contained in Appendix B. The abbreviation "Pb" refers to the petition for *certiorari* and "Pa" refers to the appendix to the petition.

National Association of Independent Insurers and three other insurance trade organizations leave to intervene in the case. The Commissioner and the insurer intervenors opposed the requests to stay implementation of the regulation. Following oral argument on March 17, 1999 on the motion to stay, the Appellate Division denied the application but accelerated the briefing schedule on all appeals. On March 22, 1999, the New Jersey Supreme Court also denied applications to stay implementation of N.J. Admin. Code tit. 11, § 3-4 (Supp. 3-15-99).

Subsequently, the American Association of Osteopathic Physicians, the New Jersey State Bar Association, and the Brain Injury Association were granted leave to appear as amici before the Appellate Division to support the challenges to N.J. Admin. Code tit. 11, § 3-4 (Supp. 3-15-99). On May 12, 1999, the Appellate Division heard oral argument by all parties. On June 14, 1999, the court issued a consolidated written opinion disposing of all issues.[3] ATLA and the Coalition filed notices of petitions for certification by the New Jersey Supreme Court on July 6, 1999, which petitions are presently pending.

The New Jersey Superior Court, Appellate Division specifically upheld the regulations at issue in the petitioner's federal challenge, N.J. Admin. Code tit. 11, § 3-4 (Supp. 3-15-99), as being within the scope of the statutory authority extended to the Commissioner and consistent with the legislative intent underlying AICRA.

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[3]New Jersey Coalition of Health Care Professionals, Inc., et al. v. New Jersey Department of Banking and Insurance, Division of Insurance, 323 N.J. Super. 207 (App. Div. 1999).

The significant legislative reforms of AICRA and the corresponding reductions in private passenger automobile insurance rates by an overall 15 percent, including at least 25 percent from the territorial base rate applicable to the personal injury protection medical expense benefits component, have been in effect since March 22, 1999.

Petitioner urges this Court to exercise jurisdiction, but offers no legal basis to justify further review of the decision below, which involved an exercise of lawful discretion to abstain under established Burford principles. Further review of the Burford abstention doctrine is unnecessary and will merely result in affirming the judgment below.

In affirming the district court's decision, the court of appeals analyzed the presence of Burford considerations. The lower court correctly determined that petitioner could and did avail itself of a timely and adequate state court review. Pa-Appendix A at 9a. It also determined that federal court adjudication of petitioner's claims would interfere with New Jersey's effort to implement an important policy concerning its no-fault automobile insurance law. Pa-Appendix A at 10. Reform of the State's private passenger automobile insurance system and the reduction in insurance premiums involves a matter of substantial and important local concern. Moreover, the regulations are an element of a comprehensive regulatory scheme whose technical components are intertwined to effect a comprehensive reform of the prior abuses to the automobile insurance system. Pa-Appendix A at 10a-11a. Federal review of petitioner's constitutional claims would interfere with New Jersey's efforts to establish and maintain a coherent regulatory policy aimed at eliminating unnecessary medical expense claims and reducing the high cost of automobile insurance in New Jersey. Pa-Appendix A at 11a. Finally,

the court of appeals rejected the tendered argument that allegations of federal constitutional violations under 42 U.S. Code Ann. § 1983 preclude dismissal of the complaint on the basis of Burford abstention. Pa-Appendix A at 14a-16a. The court distinguished Bath Memorial Hospital v. Maine Health and Finance Comm'n, 853 F.2d 1007 (1st Cir. 1988) on the ground that the petitioner here sought an individualized fact-specific review of the regulations promulgated by the Commissioner. The court concluded that the nature of the federal claim, rather than the mere assertion of a federal claim is the proper focus, under established precedent, for determining whether abstention is appropriate. Pa-Appendix A at 15a. Because federal court review of petitioner's federal constitutional due process challenge would require an analysis identical to that being performed by the state court, abstention was appropriate to prevent a parallel federal regulatory review institution. Pa-Appendix A at 15a. State court review on state law grounds could obviate the need to address the federal constitutional issues. Accordingly, the court correctly held that abstention under Burford was appropriate.

The decision of the Third Circuit Court of Appeals is entirely consistent with the decision of this Court in Burford and the progeny of cases relating to abstention doctrines decided by this Court and other federal circuit courts.

REASONS FOR DENYING THE WRIT

I. THE COMPELLING REASONS NECESSARY FOR A REVIEW ON A WRIT OF *CERTIORARI* ARE NOT PRESENT WHERE THE LOWER FEDERAL COURTS APPLIED ESTABLISHED LEGAL PRINCIPLES TO SPECIFIC FACTUAL CIRCUMSTANCES AND DETERMINED THAT ABSTENTION UNDER BURFORD WAS APPROPRIATE TO AVOID INTERFERENCE WITH NEW JERSEY'S EFFORTS TO REGULATE IN AN AREA OF LAW IN WHICH STATE INTERESTS PREDOMINATE AND AN ADEQUATE AND TIMELY STATE REVIEW WAS AVAILABLE.

The decisions of the lower federal courts in this matter are premised on the specific factual circumstances presented and apply only to the litigants involved. The lower federal courts applied established legal principles and concluded that a review of the challenged regulations by the state court was appropriate, in the first instance, since the regulation of automobile insurance is an area in which local, rather than federal interests, predominate. Both the decision to abstain and the analysis of Burford abstention considerations undertaken by the lower courts are consistent with well-established legal precedent. The decision does not conflict with any opinions of the other circuit courts; nor does the courts' analysis under Burford represent a departure from accepted legal doctrine. Because the compelling reasons necessary for review on a writ of *certiorari* are not present, the petition should be denied.

Petitioner contends that the Circuit Court opinion articulates an allegedly new principle of law which mandates Burford abstention in every case where adjudication of a state law claim in state court may eliminate the need for the federal court to review a federal constitutional claim. Pb-5. Petitioner misstates the principles articulated by the decision of the Circuit Court. The Burford doctrine has been defined by this Court in New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans, 491 U.S. 350, 361 (1989) ("NOPSI") to involve a series of tests: whether timely and adequate state-court review is available; and whether the case involves difficult questions of state law bearing on important policy problems or issues wherein federal review would be disruptive of state efforts to establish a coherent policy with respect to a matter of public concern. Pa-Appendix A at 8a.

In affirming the district court's judgment on the basis of Burford abstention, the Circuit Court concluded that AICRA and the regulations promulgated by the Commissioner "represent a complex legislative regulatory package designed to reform automobile insurance law in New Jersey, and that the courts of New Jersey are in the best position to consider the validity of the applicable regulations under state law and can do so without having to examine the constitutional questions which have been raised." Pa-Appendix A at 7a. Citing to prior decisions of this Court, Burford, supra, 319 U.S. at 333 n.29 and Chicago v. Fieldcrest Dairies, Inc., 316 U.S. 168, 173 (1942), the Circuit Court concluded that "[t]hus Burford clearly allows a federal court, in fact urges a federal court, to decline to exercise jurisdiction when adjudication of questions of state law (which can only be done by state courts) may avert the need to delve into constitutional issues like those presented here." Pa-Appendix A at 7a.

The petitioner's federal court complaint alleged that the Commissioner's adoption of regulations, which establish standards against which to measure the medical necessity of treatments and testing to be reimbursed under automobile insurance policies, deprived chiropractors of federal constitutional rights to due process and equal protection. The lower courts determined that an analysis of these constitutional issues would be inextricably entangled in, among other things, the federal court's review of the language of AICRA, the legislative intent underlying AICRA, the complex regulatory scheme implementing automobile insurance reform, and the reasonableness of the standards set forth in the regulations, i.e., whether the regulations are arbitrary and capricious. Pa-Appendix A at 12a.

If a federal court were to engage in a review of technical regulations implementing the state statute reforming portions of the private passenger automobile insurance system, it would have to undertake an identical analysis of the language and the legislative intent underlying the enactment of the statute. This analysis could, if undertaken simultaneously, conflict with the analysis conducted by the state court. Where there exists a substantial risk that federal court review of a subject typically left to the states to regulate might undermine New Jersey's efforts to establish and maintain a coherent automobile insurance regulatory policy, the federal court's decision to abstain is authorized by law and consistent with established legal precedent. The McCarran-Ferguson Act, 15 U.S. Code Ann. §§ 1011-15 (1997) underscores the fact that the regulation of insurance involves a matter of substantial regulatory concern to the states. That Act has been relied upon as persuasive support for abstention under Burford since "the states have assumed the primary role in regulating insurance." Lac D'Amiante du Quebec v. American Home

Assur. Co., 864 F.2d 1033, 1038-1039 (3d Cir. 1988). Moreover, because a timely and adequate review was available and pending in the state court, the lower federal courts correctly concluded that abstention was appropriate. The determination of the federal issues presented was inextricably entangled in a "skein of state law" that needed to be untangled before a federal case could proceed. Pa-Appendix A at 13a.

Once they were satisfied that a timely and adequate state review was available to the petitioner, both the district court and the Circuit Court correctly concluded that the result of the analysis under the second prong of the Burford doctrine justified abstention. The three elements considered by the lower courts in conducting the analysis of the second prong of Burford are : (1) whether the particular regulatory scheme, in this case AICRA and its implementing regulations, involve matters of "substantial public concern;" (2) whether it is "the sort of complex, technical regulatory scheme to which the Burford abstention doctrine is typically applied," Felmeister v. Office of Attorney Ethics, 856 F.2d 529, 534 (3d. Cir. 1988); and (3) whether federal review of a party's claims would interfere with a state's efforts to establish and maintain a coherent regulatory policy. See, NOPSI, supra 491 U.S. at 361. Pa-Appendix A at 10a.

New Jersey's "efforts to curtail sky-rocketing costs of automobile insurance premiums" in the state through legislation and regulation by the Commissioner are matters of substantial and important local interest. The nature of the regulations involved -- an all encompassing framework of technical, intertwined and interrelated provisions defining the applicable deductibles, co-pays and approvals applicable to reimbursement of medical expenses under private passenger

automobile insurance policies -- left no doubt that AICRA and its regulations involve a complex regulatory solution to the abuses of the state's private passenger automobile insurance system. Pa-Appendix A at 11a.

The lower courts' decision to abstain here is also fully consistent with established precedent. Indeed, New Jersey's effort to reform its laws governing private passenger automobile insurance is the subject of a 1985 decision of the district court wherein the federal court exercised its discretion to abstain. In Marks v. Snedeker, 612 F. Supp. 1158 (D. N.J. 1985), the district court, relying on Burford, dismissed the federal constitutional challenge to New Jersey's reform legislation. In that case, the district court found that the federal court's interpretation of the New Jersey statute could have a significant disruptive effect on New Jersey's newly reformed automobile insurance program which is "unquestionably a matter of substantial public concerns." Id. at 1161. The court also found that any constitutional analysis it might undertake would "involve an in-depth analysis of the legislative purposes which underlie a major reform effort in an area of law--- insurance -- which has typically been left to the states to regulate." Id. Pa-Appendix B at 46a. Presented with an analogous situation here, the lower courts conducted an independent analysis and determined, in the face of the federal constitutional challenge to another comprehensive automobile insurance reform initiative, that abstention under Burford was legally supported. Pa-Appendix B at 46a-49a.

Both lower courts correctly concluded that analysis of petitioner's constitutional claims, in light of the fact that the regulations apply to all health care providers, but were challenged by a particular specialty of providers, might lead to a result which could frustrate the uniformity necessary to

achieve the state's important goals. Pa-Appendix A at 11a citing University of Md. v. Peat Marwick Main & Co., 923 F.2d 265, 272 (3d Cir. 1991) (quoting Erwin Chemerinsky, Federal Jurisdiction 111-12 (Supp. 1990)). The courts relied upon the guidance offered by this Court's opinion in NOPSI, that federal adjudication of "a claim that a state agency has misapplied its lawful authority or has failed to take into consideration or properly weigh relevant state-law factors" may "disrupt the State's attempt to ensure uniformity in the treatment of an essentially local problem." NOPSI, supra, 491 U.S. at 362. Pa-Appendix B at 46a.

This Court, recently reiterated that the federal courts' power to abstain under Burford, as with other abstention doctrines, derives from the discretion historically enjoyed by courts of equity. Quackenbush v. Allstate Insurance Co., 517 U.S. 706, 727-728 (1996). Exercise of this discretion involves concern for the principles of federalism and comity. The federal court must carefully consider the federal interests in retaining jurisdiction over the dispute and the competing concern for the independence of state action. Where the state's interests predominate, the dispute should be adjudicated in the state forum. This equitable decision balances the strong federal interest in having certain classes of cases and certain federal rights adjudicated in federal court against the State's interests in maintaining uniformity in the treatment of an essentially local problem and retaining local control over difficult questions of state law bearing on policy problems of substantial public import. Ibid. (citations omitted).

Petitioner further urges review of the decision of the Third Circuit on the basis that the lower court engrafted considerations from disparate abstention doctrines onto its

analysis of Burford considerations. For example, petitioner criticizes the Circuit Court's Burford analysis on the issue of whether state court review on state law grounds may obviate the need to address constitutional questions, see Pa-Appendix A at 16a citing Burford, supra, 319 U.S. at 333 n.29, and claims that in conducting this analysis, the lower court was really engaged in a Pullman[4] analysis. Pullman involves consideration of whether state court review will dispose of an ambiguous or unsettled state law which is "obviously susceptible" to a construction which will obviate the need to decide the federal constitutional issue. Pb6-7. Petitioner's contention lacks legal merit.

The Third Circuit's decision represents the best use of abstention principles consistent with the teachings of this Court. Abstention in its various forms eases the friction between parallel judicial processes. The abstention doctrines are not mutually exclusive. "The various types of abstention are not rigid pigeonholes into which federal courts must try to fit cases. Rather, they reflect a complex of consideration designed to soften the tensions inherent in a system that contemplates parallel judicial processes." Pa-Appendix A at 6a quoting Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 11 n.9 (1987).

The Circuit Court expressly noted that "[i]t is particularly desirable to decline to exercise equity jurisdiction when the result is to permit a State court to have an opportunity to determine questions of State law which may prevent the necessity of decision on a constitutional question." Burford 319 U.S. at 333 n.29 citing Chicago v. Fieldcrest Dairies, Inc., 316 U.S. 168, 173 (1942). The "strong resemblance"

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[4]Railroad Comm'n of Texas v. Pullman, 312 U.S. 496 (1941).

between this language and the Court's language in Pullman evidences that the various doctrines are not "rigid pigeonholes". Appendix A Pa-7a at note 1 and accompanying text.

The abstention doctrines share a common purpose and design. They attempt to reconcile the conflicting pressures of the desire to avoid premature constitutional determinations, to defer to state tribunals on questions of state law, to avoid duplicative proceedings, and to interfere as little as possible with state processes, on the one hand; and show concern for upholding a litigant's choice of a federal forum and the vindication of federal rights without undue delay, on the other. Fireman's Fund Ins. Co. v. Garamendi, 790 F. Supp. 938, 951 (N.D. Cal. 1992), aff'd, Fireman's Fund Ins. Co. v. Quackenbush, 87 F.3d 290 (9th Cir. 1996) citing Henry Hart & Herbert Wechsler, The Federal Courts and the Federal System, (Paul M. Bator, et al.; eds., 3d ed. 1988).

Petitioner also claims that the Third Circuit's consideration of the pending state court action, to which petitioner was a party, for purposes of determining whether petitioner had available an adequate and timely state court review under Burford, erroneously injects elements of Colorado River abstention, which looks to the pendency of parallel state litigation. See Colorado River Conservation Dist. v. United States 424 U.S. 800 (1976); Pb7-Pb10. Once again, petitioner's claim of error lacks merit. The lower courts began their analysis of the applicability of Burford with a discussion of the fact that timely and adequate state court review was, and continued to be, available to the petitioner. Pa-9a and Pa-42a. This element of Burford analysis is well established: "Only if a district court determines that such review is available, should it turn to the

other issues..." Riley v. Simmons, 45 F. 3d 764, 771 (3d Cir. 1995).

Petitioner criticizes the Circuit Court for noting that resolution of the issues raised in the federal court complaint would involve an analysis similar to those which would be undertaken by the New Jersey Superior Court, Appellate Division. It is understandable that in the context of the Circuit Court's examination of whether the state court afforded a timely and adequate review, the court would also take notice of the fact that the pending state litigation would involve an analysis of the same or similar issues as those involved in the federal case. In this regard, Burford's "timely and adequate state review" analysis can resemble the analysis undertaken under Colorado River, which latter analysis looks to whether there is a parallel state proceeding. These analyses, applied in their own contexts, result in the same outcome: a consideration of whether, in light of comity and the nature of the state law issues presented, the initial analysis of the state law issues should be made by the federal court or by the state court. Colorado River's concerns with the avoidance of piecemeal litigation, waste of judicial resources, the convenience of the parties, and risk of conflicting results are not far removed from Burford's attention to whether federal court intervention would interfere with the state's efforts to establish and maintain a coherent regulatory scheme in an area of substantial local concern. The issue of whether the state and federal actions were "parallel" is not a necessary element of either court's analysis. Thus, petitioner's claim that a Colorado River factor was improperly engrafted onto the Burford analysis misstates and distorts the Circuit Court's reasoning.

Both the district court and the Circuit Court correctly predicted that the New Jersey state court review would be accelerated, and that the petitioner and other challengers would have an opportunity to present their requests for a stay to the Appellate Division, and if necessary, the New Jersey Supreme Court, before the regulations would be implemented.

Burford abstention is utilized by the federal courts "'to avoid federal intrusion into matters of local concern and which are within the special competence of local courts.'" Kentucky West Virginia Gas Co. v. Pennsylvania Public Util. Comm'n 791 F.2d 111, 1115 (3d Cir. 1986) (quoting International Bhd. Of Elec. Workers v. Public Serv. Comm'n. 614 F.2d 206, 212 n.1 (9th Cir. 1980)); see also Meredith v. Talbot Cty.,Md., 828 F.2d 228, 231 (4th Cir. 1987) (the underlying purpose of Burford abstention is to enable federal courts to avoid needless conflict with the administration by a state of its own affairs."). 17A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure: § 4243. Pa-Appendix A at 8a.

Here, in addition to allowing the state court to retain control over questions of important state laws and local concerns, the decision of the lower federal court to abstain could focus, if not eliminate, the federal constitutional issues by first having the state court render its definitive ruling on the state law issues. Indeed, it is apparent upon review of the state court decision, that the New Jersey Superior Court, Appellate Division painstakingly considered each of the challenges to the regulations. The state court addressed specific facts regarding the regulations and scrutinized the administrative process. The state court found the regulations to be authorized by the plain language of AICRA and consistent with the legislative intent to reduce automobile

insurance costs by eliminating fraud and the overutilization of medical expense benefits:

> The establishment of standard treatments and diagnostic tests established in N.J.A.C. 11:3-4 are consistent with the legislative intent to discourage the performance of unnecessary medical services. The regulations are designed to provide all necessary medical care to those injured accident victims in need of treatment. They neither deny patients access to care nor interfere with physicians' ability to practice medicine. What the regulations do, however, consistent with AICRA's objective, is to establish meaningful standards against which to measure the reimbursement of medical treatments and diagnostic tests. We conclude the regulations are authorized by AICRA's plain language and consistent with legislative intent. [New Jersey Coalition of Health Care Professionals, supra, 323 N.J. Super. at 239.]

The state court also noted that it perceived that "at the heart of the many physician (and attorney) challenges to the protocols is their inherent opposition to the concept of protocols, the cornerstone of AICRA's legislative reform." Id. at 246-7.

With the state court decision in hand, review of any federal constitutional questions could be narrowly focused, or even eliminated. The lower federal courts correctly anticipated that petitioner's claims of alleged federal due process and equal protection violations could, upon completion of the state court proceeding, be examined in light of the state court's legal analysis and conclusion that the regulations are authorized by AICRA's plain language and rationally related to a legitimate public interest. This result was precisely what the Third Circuit intended and is fully consistent with legal abstention doctrine.

Petitioner's argument that its petition should be granted on the alleged ground that the lower federal courts erroneously considered and commingled various standards relating to various abstention doctrines is no criticism at all. Petitioner's request for review on the basis that the lower federal courts considered Colorado River and Pullman abstention factors to support the decision to abstain on the basis of Burford should be rejected. Contrary to petitioner's contention, the opinions of the district court and the Third Circuit are consistent with the various abstention doctrines and lawfully apply legal precedent to support the decision to abstain.

Petitioner's contention that the decision of the Circuit Court is in conflict with decisions in other circuits (Pb12-Pb14) is also without merit. The decision of the Circuit Court is fully consistent with the decisions of other circuit courts. Any alleged inconsistency with decisions of other circuits in the cases cited by petitioner results from circumstances which are readily distinguishable from those at issue in this matter. It has long been recognized that federal

court review of state administrative regulations prior to state court review might result in the creation of a parallel regulatory review institution to which any litigant challenging a state regulation could resort. This very concern was raised by then-Judge Breyer writing for the Court of Appeals for the First Circuit in Bath Mem. Hosp. v. Maine Health and Fin. Comm'n, supra, 853 F.2d 1007.

Bath recognizes that abstention allows a federal court to avoid the awkward circumstance of turning the federal court into a forum that will effectively decide a host of detailed state regulatory matters, to the point where the presence of the federal court, acting as a regulatory decision-making center, makes it significantly more difficult for the state to operate its regulatory system. Id. at 1012. In Bath, Judge Breyer distinguished the requisite review of a statute which regulated hospital charges in a way that interacted with federal law under Medicare's "prospective payment system" from the review of an administrative regulation on the basis that the former review would not entail an analysis of a fact-based agency determination. Review of a legislative enactment with a clear meaning would not be subject to modification or interpretation in the agency regulatory process. Therefore, review of a state statute by the federal court would not pose the risk of interference in a complex state regulatory system. Id. at 1015. Here, the medical protocol regulations are supported by a detailed administrative agency record. In addition, while the medical protocol regulations challenged by the petitioner apply to all health care professionals, federal court review of the regulations solely as they apply to chiropractors, creates a risk of inconsistent judicial determinations which might threaten New Jersey's comprehensive regulatory scheme. Id. at 1013-14. Moreover, Bath involved a Supremacy Clause, U.S. Const.,

Art. IV, challenge to the state statute, and it has been held that federal courts are particularly equipped to apply federal policies relevant to the application of preemption principles. Id. at 1015 (citations omitted). A similar federal policy was not implicated in petitioner's challenge to the Commissioner's regulation. As such, there are important distinctions between Bath and the circumstances presented in this matter.

A similar distinction applies to the Second Circuit's analysis in Alliance of American Insurers v. Cuomo, 854 F.2d 591 (2d Cir. 1988). That matter involved a constitutional challenge to an interim New York state statute which temporarily suspended the authority of the Superintendent of Insurance to order the liquidation or rehabilitation of any medical malpractice insurer and limited the surcharges insurers could impose to satisfy deficiencies within the State's medical malpractice insurance fund. Insurers argued that the law deprived them of constitutionally adequate rates and thus, effected an unconstitutional taking of property without due process. In Alliance there were no ongoing state judicial or administrative proceedings, and no challenge to administrative, regulatory or judicial action under state law was involved; the Superintendent's exercise of the authority conferred to him by state law was not the subject of challenge and the interim nature of the law at issue removed any risk that the state's comprehensive insurance scheme would be jeopardized. Id. at 600. Here, the Commissioner's authority to adopt the medical protocol regulations and the regulations governing the new dispute resolution system form an integral part of petitioner's challenge to important state regulatory matters. See id. at 601. Thus, the circumstances presented in Alliance are inapposite to petitioner's challenge and the case provides no support for the position advance by the petitioner.

The lower court's reasoning here is more analogous to the decision rendered in Fireman's Fund Ins. Co. v. Garamendi, supra, 790 F. Supp. at 951-55, aff'd, Fireman's Fund Ins. Co. v. Quackenbush, supra 87 F.3d at 296-97, which involved an insurer's challenge to the constitutionality of regulations adopted by the California Insurance Commissioner to implement insurance rate rollback provisions pursuant to a state initiative. In Fireman's Fund the district court and the Ninth Circuit found that both Burford and Colorado River abstention doctrines could be invoked because adequate and expeditious state court review was available and the state had established a coherent policy with respect to a matter of substantial public concern involving difficult questions of state law. In the present case, the district court and the Court of Appeals correctly applied the same reasoning to support the dismissal of petitioner's complaint.

Since the lower federal courts' decisions do not conflict with decisions pronounced by any other circuit courts, there is no basis to allege a conflict between the circuits as a basis to assert review on *certiorari*.

Finally petitioner claims that the allegation of federal constitutional violations pursuant to a §1983 claim precludes dismissal of its complaint on the basis of Burford abstention. Pb-9. This contention lacks legal merit. Petitioner relies upon Tovar v. Billmeyer, 609 F.2d 1291 (9th Cir. 1979). That case, involving Colorado River abstention, is anomalous to recent holdings of this Court and those of other circuits. Tovar involved a challenge to the district court's second abstention ruling. In Tovar, the district court initially dismissed the complaint on abstention grounds and directed the plaintiffs to the state court, which court had retained

jurisdiction over an earlier state proceeding. Plaintiffs then filed a second state court action, which action was eventually dismissed. When the litigants returned to federal court at the conclusion of all of the state court proceedings, the district court once again dismissed the complaint on abstention principles. At issue in Tovar was whether the litigants could be twice denied access to the federal court where they had made an appropriate reservation of their federal claims in the state court proceeding. Such circumstances are not present here.

Petitioner's argument notwithstanding, this Court has held that abstention is, indeed, appropriate even where the federal complaint alleges a deprivation of first amendment rights. See, e.g., Ohio Civil Rights Commission v. Dayton Christian Schools, 477 U.S. 619, 625-626 (1986) (abstaining under Younger where state court proceedings have already been commenced); see also Heck v. Humphrey, 512 U.S. 477, 487 n.8 (1994) (explaining that abstention may be appropriate where there are parallel state court proceedings initiated by a state criminal defendant who files a federal civil-rights suit during the pendency of his state court criminal trial, state court appeal, or state habeas corpus action).

Moreover, contrary to petitioner's assertion, the lower federal courts have frequently applied Burford abstention to support dismissals, even where the complainant asserts a §1983 claim. See, e.g., Graham v. Albemarle, 826 F. Supp. 167, 170 (W.D. Va. 1993), affirmed as modified, 19 F.3d 11 (4th Cir. 1994) (unpublished) (abstention under Burford and Pullman appropriate to dismiss landowner's §1983 claim); Coin Call Inc. v. Southern Bell Telephone and Telegraph Co., Inc., 636 F. Supp. 608, 610-11 (N.D. Ga. 1986) (Burford abstention appropriate in case involving a complex

regulatory scheme controlling pay telephone outlets where plaintiff advances a tenuous constitutional claim, notwithstanding that jurisdiction is grounded on §1983 claim); St. Michael Hospital of Franciscan Sisters, Milwaukee, Inc. v. Thompson, 725 F. Supp. 1038, 1043-44 (W.D. Wis.1989) (Burford abstention appropriate in §1983 action challenging state administrative agency calculation of Medicaid reimbursement rates); Osteopathic Hospital Founders Ass'n Inc. v. Splinter, 955 F. Supp. 1351, 1357-61 (N.D. Okla. 1996) (abstention under Burford appropriate in §1983 action challenging Medicaid reimbursement rate).

In this case, therefore, even in the face of an alleged violation of the chiropractic petitioner's rights pursuant to 28 U.S.C. §1983, the lower courts did not err in the decision to abstain. The Circuit Court here correctly decided that the "focus should not be on *whether* a federal claim has been presented, but rather on the *nature* of that claim." Pa-Appendix A at 15a.

The decision of the district court to abstain, as affirmed by the Third Circuit, is consistent with well-established legal precedent and the precepts of wise judicial administration as reflected in the abstention doctrines. There is, therefore, no basis to support Supreme Court review by means of *certiorari*.

CONCLUSION

For the reasons stated above, the respondents respectfully request that the petition for a writ of *certiorari* be denied.

Respectfully submitted,

JOHN J. FARMER, JR
Attorney General of New Jersey

ANDREA M. SILKOWITZ
Assistant Attorney General
(Of Counsel)

JOHN C. GRADY
Deputy Attorney General
(Counsel of Record and On the Brief)

R.J. Hughes Justice Complex
Post Office Box 117
Trenton, New Jersey 08625
(609) 292-1506

Attorneys for Respondents

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